

REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA

JANUARY AND SEPTEMBER TERMS, 1923

VOLUME CX

HENRY P. STODDART,

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BY HENRY P. STODDART, REPORTER OF THE SUPREME COURT,
For the benefit of the State of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA
JANUARY TERM, 1923.

PETSCH & McDONALD, APPELLEE, V. WALKER D. HINES,
DIRECTOR GENERAL, APPELLEE: UNION STOCK YARDS
COMPANY OF OMAHA, APPELLANT.

FILED MARCH 27, 1923. No. 22254.

1. **Carriers: NEGLIGENCE: EVIDENCE: SUBMISSION TO JURY.** In a suit against common carriers for damage resulting from their alleged negligence whereby they delayed the unloading and delivery of a shipment of live stock, the evidence summarized in the opinion is held sufficient to raise a question of fact to be submitted to the jury, and to support the verdict.
2. ———: **DAMAGES.** Where there is competent evidence in support of a claim for damages resulting from delay in unloading and delivering a shipment of live stock, and from a consideration of which different minds might arrive at different amounts, the verdict of a jury will not be held excessive when it is within an amount that seems fair and reasonable under the evidence.
3. **New Trial: MOTION: DETERMINATION AT SUBSEQUENT TERM.** Where a trial court takes a motion for a new trial, which is filed during the term at which a verdict is returned, under advisement and fails to pass upon the motion until after the term has been adjourned and a subsequent term convened, it does not lose jurisdiction of the subject-matter, but may then pass upon the motion and enter judgment.
4. **Jury: PEREMPTORY CHALLENGES.** The right to peremptory challenges in civil actions did not exist at common law, and any right thereto is dependent on statutes or rules of court.
5. ———: ———: **RULE OF COURT.** In this state the only authority for peremptory challenges in civil actions is by rule of court.
6. ———: ———: **SEVERAL PARTIES.** In civil actions where there are several plaintiffs or several defendants, generally all on one side constitute but one party and are entitled to three peremptory challenges, and no more.
7. ———: ———: **PARTIES UNITED IN INTERESTS.** In civil actions a party and an intervener whose interests are not adverse constitute a single party within the rule governing peremptory challenges.
8. ———: ———: **PARTIES NOT UNITED IN INTERESTS.** In civil actions

Petsch & McDonald v. Hines.

where several plaintiffs, interveners, or defendants set up separate and distinct causes of action or defenses, and have conflicting rights among themselves which the verdict of the jury will affect, in the furtherance of justice the court will allow each of such parties three peremptory challenges.

9. ———: ———: REFUSAL TO ALLOW. *Held*, under the facts disclosed, that the refusal of the court to grant additional challenges does not constitute prejudicial error.

APPEAL from the district court for Douglas county:
CHARLES LESLIE, JUDGE. *Affirmed*.

Brown, Baxter & Van Dusen, for appellant.

Harry W. Shackelford, contra.

C. A. Magaw, Douglas F. Smith and Thomas W. Bockes, for Walker D. Hines, appellee.

Heard before MORRISSEY, C. J., ROSE, DAY and GOOD, JJ., TROUP, District Judge.

MORRISSEY, C. J.

Plaintiffs brought this action in the district court for Douglas county against Walker D. Hines, director general of railroads, and the Union Stock Yards Company. Plaintiffs alleged that on August 23, 1919, they delivered, at Haig, Nebraska, to the director general for transportation over the lines of the Union Pacific Railroad Company to Omaha, Nebraska, six car-loads of cattle; the cattle to be delivered to its commission firm through the agency of defendant Union Stock Yards Company. The petition further alleged that the defendants negligently delayed the delivery of the cattle and negligently detained them in the cars without furnishing them with feed or water or an opportunity to rest; that the negligence charged caused a shrinkage in the weight of the cattle to the plaintiffs' damage to the amount of \$327.06, and further that, the cattle being delivered late in the day at an hour when the general market for the sale of such cattle had closed, plaintiffs' commission merchants were unable to sell them upon the day of their arrival and were

obliged to hold the cattle until the following day, when they were sold upon a falling market, all to the damage of plaintiffs in the sum of \$759.64.

The director general filed a separate answer in which he denied any negligence upon his part in the delivery of the cattle.

The Union Stock Yards Company filed its separate answer alleging that on the day plaintiffs' cattle arrived at Omaha there existed unusual and extraordinary conditions at its stock yards; that upon that day live stock were received in such unprecedented numbers that it was impossible to handle them in the usual and ordinary manner. And it was further alleged that an extraordinary and unusual storm occurred at Omaha on the morning when the cattle arrived, and that this storm added to the difficulties arising from the congestion caused by the great number of cattle received and prevented the expeditious delivery of the cattle. The answer further alleged that plaintiffs' cattle were found to be afflicted with an infectious disease, and were, therefore, ordered into quarantine by a representative of the United States government; that they had to be run through a dipping vat before being released from the quarantine, and that this caused a delay in delivery, for which defendant was in no wise responsible and which caused a depreciation in the market value of the cattle.

Trial was had to a jury, which returned a verdict in favor of plaintiffs and against both defendants for \$650. Thereafter, upon motion of the defendant the director general, an indemnity judgment in his favor and against the stock yards company was entered for the amount of the judgment. The Union Stock Yards Company only has appealed.

The principal error assigned goes to the sufficiency of the evidence to support the judgment. It is said in appellant's brief: "Plaintiffs having proved only a *prima facie* case of delay, and defendant having proved

without contradiction an unprecedented congestion, and plaintiffs having failed to prove in reply negligence in coping with the extraordinary circumstances, the record does not support a judgment in favor of plaintiffs and against this defendant."

In support of the quoted statement many citations are given. We have not examined them, but will assume that, if the facts were as appellant assumes them to be, its proposition of law might be applicable. Our examination of the record, however, leads us to a somewhat different conclusion as to the facts. The proof shows that the cattle were loaded at Haig, Nebraska, on the evening of August 23, on a train scheduled to reach Omaha August 25 at 6 a. m.; that the train arrived ahead of its scheduled time and was switched onto appellant's track No. 4, and the way-bills delivered to appellant at 5:48, twelve minutes before the time scheduled for the arrival of the train in Omaha. Upon this uncontradicted showing the trial court instructed the jury that neither negligence nor delay could be imputed to the director general in the transportation of the cattle from Haig to Omaha, but the director general being a common carrier it was his duty to provide reasonable facilities for the delivery of the cattle at destination, and not having provided such facilities, but having employed the Union Stock Yards Company to furnish them and to unload and deliver the cattle to the consignee, the Union Stock Yards Company became in legal effect the agent and servant of the director general. And if the Union Stock Yards Company negligently failed to unload and deliver the cattle within a reasonable time, both the director general and the Union Stock Yards Company became liable to plaintiffs for any damage sustained. The court further instructed the jury that, if they found "the delay in placing the cars at the chutes and unloading was unavoidable or was due to an unusual or unprecedented number of cars being received that morning, or to un-

usual or extraordinary weather conditions, without any negligence on the part of the defendant Union Stock Yards Company, then, in such case, the plaintiffs would not be entitled to recover."

A reading of this instruction shows that the issues of fact presented by the pleadings were fairly presented to the jury. Is the evidence sufficient to support the finding? The evidence shows that in the transaction of appellant's business a day is reckoned in 24-hour periods beginning at midnight. As is customary, trains loaded with live stock began to arrive early on the morning of August 25. The first train of live stock, consisting of 57 cars, was delivered to appellant at 12:55 a. m. Between that hour and 6 a. m. appellant received 586 cars and unloaded 150 cars, an average of only 30 cars an hour, whereas by its own evidence it is shown to have an unloading capacity of 100 cars an hour. It will be seen that defendant, throughout the early hours of the day, did not operate its equipment to its ordinary capacity, and thus permitted a large number of car-load shipments to accumulate upon its tracks. According to what appears to be the most reliable evidence, plaintiffs' cattle were not unloaded until about 1:20 p. m., and were not delivered to the consignee until 2:35 p. m. After being unloaded the cattle were inspected by a government agent, and, in compliance with his directions, they were put through a dipping vat. The time intervening between the unloading and the actual delivery may well be accounted for by this requirement of the government and may not fairly be chargeable against appellant. As already mentioned, the cattle were delivered to appellant at 5:48 a. m. but were not unloaded for six or seven hours thereafter. Had appellant throughout the early hours of the day unloaded the cars at the rate of 100 cars an hour, as its own testimony shows it was able to do, at the time it received plaintiffs' cattle it would have had only 86 cars entitled to a priority over plaintiffs' shipment.

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This would constitute less than one hour's work and ought to have been finished by 7 o'clock a. m. It is not possible to calculate with exactness the hour at which plaintiffs' shipment might have been unloaded, but it would appear that an additional hour or two, or until 8 or 9 o'clock, would be ample time within which to unload plaintiffs' shipment. We take no note of appellant's defense of unfavorable weather conditions, because there is a total failure of proof to support this defense.

The foregoing calculation is made, also, without taking into account what appellant claims was an unusual and unprecedented rush of business, and congestion on its tracks; but an expeditious use of appellant's facilities throughout the early hours of the morning might have avoided much of the congestion. Nor are we ready to say from a consideration of all the evidence that there was such a press of business as is claimed by appellant. The proof shows that an average "run" during the period of the year when this shipment was made is from 550 to 800 cars a day, and that trains usually arrive between midnight and 7 o'clock in the morning; that cars are ordinarily unloaded within two hours after their arrival, the work being completed about 8:30 in the morning. It is claimed by appellant that on the day plaintiffs' shipment arrived it received 1,283 cars, which was the largest in all its history. There is some proof in the record to support this claim, but it is not without question even on appellant's own showing. On this point, where we might expect to find positive proof, there is marked conflict in the evidence. The evidence might support a finding that 1,283 cars were received or it might support a finding that the number was 974 cars, while from other evidence it might be found that the total number was only 844. With this conflict in the record, the number of cars received that day became a disputed question of fact. If the maximum number claimed, 1,283, were received, it was a

most unusual run. If, on the other hand, appellant received only the minimum shown, 844 cars, it was not such an unusual run as to constitute an extraordinary congestion.

In connection with appellant's claim of congestion, it is asserted that, after the train containing plaintiffs' shipment was placed on track No. 4, another train was placed upon that track, thus covering up plaintiffs' shipment and making it impossible to unload it until the second train had been unloaded. We are not prepared to say that the presence of the second train upon track 4 would constitute an excuse for defendant's failure to unload plaintiffs' cattle within a reasonable time after their receipt. In any event, it is not a sufficient defense under the circumstances of this case, for the second train was not placed upon track 4 for one hour and 40 minutes after the cars containing plaintiffs' cattle had been placed thereon, and it was removed at 9:05. Giving the evidence the construction most favorable to appellant, the track then remained open until 11:20. A jury might well have found that appellant had ample time to unload plaintiffs' cattle before the second train was placed on track No. 4; also that, had it moved with reasonable dispatch after the second train was removed from track 4, plaintiffs' cattle might have been unloaded and delivered during the early hours of the day. The evidence is sufficient to support the verdict.

It is claimed that the damages are excessive. Experience in the actual shipment and handling of large numbers of cattle enables those engaged in the business to approximate the shrinkage under given conditions. The evidence of shrinkage is perhaps as positive and satisfactory as the nature of the subject will permit. What has been said of shrinkage may also be said of live-stock markets. The shrinkage in the cattle and the drop in the market, with the reason for both, were fully gone into and explained by competent witnesses

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before the jury, and, when considered in the light of the evidence, the verdict does not appear excessive.

It is said that the court lacked jurisdiction to enter judgment on the verdict. The verdict on which this judgment is based was returned December 11, 1920, at the October term. Two days later appellant filed a motion for judgment notwithstanding the verdict, as well as a motion for a new trial; and the director general filed a motion for a new trial, and a motion for an alternative judgment against his codefendant, the Union Stock Yards Company. January 15, 1921, during the October, 1920, term, the court entered an order taking under advisement the motions. Sixteen days later the court entered an order on the motion of the director general for an indemnity judgment against the Union Stock Yards Company.

Apparently the court as well as the parties were under the impression that an order overruling the motions for new trial had been made and entered, but no such order was in fact made or entered. This omission was not discovered until after the adjournment of the October, 1920, term. And upon such discovery the court, at the February, 1921, term, overruled the respective motions for a new trial and entered a general judgment upon the verdict, and again entered an alternative judgment in favor of the director general against the Union Stock Yards Company.

The court having taken the motion for new trial under advisement at the October, 1920, term, it did not lose jurisdiction merely because of the adjournment of that term of court and the convening of a subsequent term. While this was not the precise question presented in *Toogood v. Russell*, 3 Neb. (Unof.) 189, yet the principle was recognized.

As a final assignment appellant complains because the court refused to permit appellant and its codefendant each the full number of three peremptory challenges to the jury. The right to peremptory challenges

in civil actions did not exist at common law, and the right thereto is dependent on statutes or rules of court.

At the regular session of the first general assembly of the territory of Nebraska, held in 1855, certain parts of the Code of Iowa were adopted. Section 354, found on page 91, Nebraska Statutes, 1855, 1856, 1857, provides: "The plaintiff first, and afterward the defendant, shall complete his challenges for cause. They may then in turn in the same order have the right to challenge one juror each until each shall have peremptorily challenged five jurors, and no more."

The provision above quoted was modified at the January, 1857, session of the territorial legislature by the passage of section 13, ch. 14, found on page 69, Nebraska Statutes, 1855, 1856, 1857.

At the fourth session of the territorial legislature, 1857-1858, a comprehensive "Code of Civil Procedure" (Neb. St. 1857, 1858, 1859, page 109), copied almost verbatim from the Code of Ohio, was adopted, and with slight changes has remained our Code of Civil Procedure to the present day. In this enactment all mention of peremptory challenges is omitted. However, the right of peremptory challenge appears to have been still recognized by the courts.

Mr. Justice Maxwell in his valuable work on Pleading and Practice (6th ed.) p. 187, in a foot-note, says: "In the absence of any statutory authority for such challenges there is no doubt of the power of a court to provide by rule for a reasonable number on each side. The only authority in Nebraska for peremptory challenges is by unwritten rules of court." Perhaps for the purpose of putting the unwritten rules in concrete form, for the question does not appear to have been involved in the case, the court in *Kremling v. Lallman*, 16 Neb 280, announced that, upon the trial of a civil case, "neither party is entitled to more than three peremptory challenges." Just when or how the court arrived at

the number mentioned is not discoverable from the books.

In dealing with the subject in a case arising under a liquor statute which gave a cause of action to one suffering injury because of defendants' traffic in intoxicants, this court said: "When such action is brought against two or more defendants they are entitled to no more peremptory challenges of jurors than where the action is against a single defendant." *McClay v. Worrall*, 18 Neb. 44.

As to the rights of coplaintiffs or codefendants to peremptory challenges in 24 Cyc. 356, it is said: "In civil actions where there are several plaintiffs or several defendants, the general rule is that all on one side constitute but one party and are entitled only to the number of peremptory challenges allowed a single plaintiff or defendant; and statutes giving to 'each party' a certain number of peremptory challenges are uniformly so construed. A party and an intervener whose interests are not adverse constitute a single party within the application of this rule. The rule, however, is to be applied according to the reasons upon which it is based and limited (to) cases in which the positions of the several parties upon the same side are similar, so while the fact that several defendants who set up a common defense plead separately does not entitle them to any additional peremptory challenges, the rule is otherwise where they set up separate and distinct defenses presenting different issues, or where the parties on one side, although having a common cause against the other, have conflicting rights among themselves which the verdict of the jury will affect."

Coming directly to the question presented on this appeal, we find that at the opening of the trial each defendant asked that it be allowed three separate peremptory challenges. These requests were denied. Thereupon each defendant asked that the record be made to show that it exercised every peremptory chal-

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lenge allowed. This request was denied, and the record fails to disclose whether defendants, or either of them, exercised any of the challenges allowed.

In view of the separate and distinct defenses set up by the defendants and the contingent right of one to recover over from the other, the court might well have allowed each defendant to exercise its separate right to three peremptories. However, under the facts disclosed by this record, the ruling cannot be held to be prejudicial, and the judgment is

AFFIRMED.

WILBER GARDINER V. STATE OF NEBRASKA.

FILED MARCH 27, 1923. No. 22977.

1. **Robbery:** EVIDENCE. In a prosecution for robbery, the evidence outlined in the opinion *held* sufficient to require the submission of the cause to the jury to determine the guilt or innocence of the defendant.
2. ———: INSTRUCTIONS. In a prosecution for robbery, where there is evidence tending to show that two persons actually confronted the person robbed and by the use of a revolver put him in fear and took from him a sum of money, and that the defendant had furnished the revolver which was used, and at the time of the robbery was standing near-by acting as a "look-out," *held* that the giving of the instruction set out in the opinion was not prejudicially erroneous.

ERROR to the district court for Douglas county:
CHARLES LESLIE, JUDGE. *Affirmed.*

C. E. Walsh and *John M. Berger*, for plaintiff in error.

Ora S. Spillman, Attorney General, and *C. L. Dort*, *contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE and DEAN, JJ., RAPER, District Judge.

MORRISSEY, C. J.

Defendant was convicted in the district court for Douglas county of the crime of robbery, and he prose-

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cutes error to reverse the judgment and sentence therein pronounced upon him.

The first assignment of error urged is the refusal of the court to instruct the jury to return a verdict of not guilty. On the evening of May 13, 1922, Asa M. Hall and Gazema Thomas, while walking upon one of the public streets of Omaha, were met by two men, one of whom presented a revolver, commanded them to halt, and took from Mr. Hall \$4. While the two men mentioned were in the act of committing the robbery, or immediately thereafter, Miss Thomas saw another man across the street, who walked rapidly down his side of the street in the same direction in which the two men who then confronted Mr. Hall and Miss Thomas departed after the robbery, and he was seen by Mr. Hall and Miss Thomas to increase his speed and travel in the same direction as their assailants. Because of the darkness Mr. Hall and Miss Thomas were unable to observe the features of this man, and, upon the trial, they admitted that they were unable to identify defendant as the party. The case was tried by the state on the theory that defendant was one of a party of three, consisting of Thomas Murphy, Thomas Sheyperski, and defendant, who were jointly engaged in the enterprise. Shortly after the robbery Sheyperski was arrested by the police. The following day defendant was arrested, and the testimony of the peace officers is to the effect that he told them that he and Murphy and Sheyperski went out with the purpose of "doing some stick-ups;" that they took a street car and went to Benson where they robbed a man; that later they robbed Mr. Hall; that while Mr. Hall was being robbed by Murphy and Sheyperski defendant acted as "the look-out." The evidence also discloses that the revolver which was used was furnished by defendant. The statements of defendant were testified to by several witnesses and were not directly contradicted by any witness, defendant refraining from testifying in his

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own behalf. Murphy and Sheyperski, however, who had plead guilty to the charge, testified in behalf of defendant and completely exonerated him from any connection with the crime. By several members of defendant's family, and two witnesses who were apparently disinterested, defendant undertook to establish an alibi. If the testimony of defendant's witnesses is correct as to the time and place they claim to have seen defendant, he could not have been at the scene of the robbery. However, this testimony must be considered in connection with all the facts established. Murphy and Sheyperski confessed to their part in the crime. It is admitted on all hands that the revolver used was furnished by defendant; that after the robbery it was returned to him and through his agency delivered over to the officers of the law. The statements which he made to the peace officers appear to have been freely and voluntarily made, and he even went with them and gave information which resulted in the arrest of Murphy. It is suggested in the brief that his confessions were wrung from him under "third degree methods," but there is no basis in the record for this assertion. The evidence outlined is clearly sufficient to support the verdict and the court did not err in submitting the cause to the jury.

The further assignment is made that the court erred in instructing the jury as follows:

"Where two or more defendants are charged jointly with the commission of a crime, it is not necessary that it be shown that each of the defendants, or either one of them, when tried alone, actually committed the crime charged.

"It is sufficient if it be shown that the defendants were acting together jointly for the common purpose and that the essential elements of the crime exist as to any of them, in which event all would be equally guilty of the crime, and any one of them may be prosecuted alone."

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The instruction was proper under the evidence. 34 Cyc. 1806; 23 R. C. L. 1159, sec. 26.

Other criticisms of the trial have been considered, but no substantial error is found in the record, and the judgment is

AFFIRMED.

SIDNEY A. EISEMANN ET AL., APPELLEES, V. LARY ANDERSON ET AL., APPELLANTS.

FILED MARCH 27, 1923. No. 22284.

1. **Fraud: EXPRESSIONS OF OPINION.** An expression of advice, opinion or judgment made by one soliciting a consignment of wool to be sold on commission by his principal at a distant market, to the effect that the wool would sell if shipped to his principal, and scoured, for \$2,000 more than the shippers allege had been offered for it in the condition it then was, will not support an action, or counterclaim by the shippers against the principal for damages based upon the fact that the wool, when scoured and sold, did not realize as much as the alleged former offer.
2. ———: ———. Such expressions of opinion as to the proceeds of a sale to be made at a distant market at a future time, being to the knowledge of both speaker and hearer, based upon a future condition liable to be affected by many factors, and being made merely to induce a consignment for sale on commission, are merely, "trade talk," and are not to be relied upon as a statement of fact for which the principal is bound to respond in damages if the wool actually sold for less than the amount stated.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

Magney & Magney, for appellants.

Charles Battelle, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE, DAY,
DEAN and ALDRICH, JJ., RAPER, District Judge.

LETTON, J.

Plaintiffs are wool commission brokers. The petition alleges that defendants consigned to plaintiffs a car-load of wool and drew upon them for the sum of \$10,880.40, which sum was paid, and the consignment accepted;

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that defendants ordered plaintiffs to scour the wool and sell to the best advantage, which was done; that the net value of the wool was \$1,531.09 less than the amount of the draft plaintiffs had paid on account of it, for which sum plaintiffs pray judgment. An exhibit was attached showing in detail the items of credit and debit.

An answer and counterclaim was filed. The answer was in effect a general denial, but the counterclaim substantially alleges that in May, 1919, one Ballard was the agent of plaintiffs for the soliciting of consignments of wool to plaintiffs, and as such agent he examined the sheep of defendant, and the wool which was then being clipped; that defendants at that time had an offer of 45 cents a pound for all the wool just as it came from the sheep, which would have netted them \$16,385.40, all of which Ballard knew; that he "was consulted by defendants in his capacity as a wool expert and as the representative of the Eisemann Brothers Wool House;" that he made false and fraudulent representations as follows:

"The price of 45 cents a pound is much too low for your wool and I would not accept it. You should consign it to my house and instruct them to scour it before selling. While it is dirty and muddy, it will not scour out much over 60 per cent., but even if it should scour 75 per cent., and I never saw any wool, no matter how dirty, scour out that much, still it will net you as scoured wool at least \$2,000 more on the car-load than you are offered now. If you sell it for 45 cents you are just throwing \$2,000 away."

That defendants had no experience in growing wool, or in scouring it, and relied on him as a wool expert; that they stated to Ballard "that they did not care to speculate or take chances with their wool, but desired to be sure of their money for it; that Ballard then repeated his assurance that the very least they could realize in excess of the offer of 45 cents a pound would

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be \$2,000, and that it might run much higher than that. Whereupon relying on the statements and representations so made by the said Ballard as a wool expert and as the duly authorized agent of plaintiffs, defendants consigned their wool to plaintiffs and drew on plaintiffs for \$10,880.40, which was paid by plaintiffs, and which was the only money ever received by defendants for their 36,412 pounds of wool."

It is further alleged that defendants would have accepted the offer of 45 cents a pound but for the false and fraudulent representations and statements of Ballard, and because of their reliance upon the same they have been damaged the difference between the amount of the offer and the amount paid by plaintiffs, being the sum of \$5,505, for which sum they pray judgment.

A general demurrer to the counterclaim was sustained. Defendants elected to stand upon the counterclaim, which was thereupon dismissed, and defendants appeal.

Do the facts pleaded in the counterclaim constitute a cause of action for damages for fraud and deceit? In the first place the plaintiffs were not endeavoring to purchase the wool. The relation created between the plaintiffs and defendants was that of commission agent and principal. There is no complaint of any fraud or false dealing thereafter, or failure to properly account for the wool which was consigned to plaintiffs for sale. Ballard was merely an agent to procure consignments of wool to be sold for the benefit of the consignor. The statement of fact made by Ballard as to the wool, in order to procure the consignment, was, "While it is dirty and muddy, it will not scour out much over 60 per cent., but even if it should scour 75 per cent. * * * it will net you as scoured wool at least \$2,000 more on the car-load than you are offered now." There is no allegation that the statement was false or untrue with respect to the percentage that the wool would "scour out," and we cannot presume that the statement

was false in this respect. It furnishes no ground for complaint.

The other allegation relied upon is that Ballard said the wool "will net you as scoured wool at least \$2,000 more on the car-load than you are offered now." This is not a representation of an existing fact, but is an expression of opinion that at some future time the wool would sell upon the market for \$2,000 more than the prices offered. Under some circumstances, where special trust or confidence is placed in a seller, on account of the purchaser's ignorance and inability to learn the truth without examination, the purchaser is entitled to rely on the statements of the seller. This principle can hardly apply to a case where there was no confidential or trust relation, and where both parties knew that the article solicited was to be consigned for sale upon a distant public market whose prices varied and fluctuated with demand and supply. The fact that the wool market is controlled and affected by supply and demand and that it is affected by world-wide conditions must have been in the minds of both the consignor and the agent of the consignee. There was no guaranty or promise made that the wool would be sold at any definite price, and there were no instructions given that it should not be sold for less than a definite price. The consignors took the risk, relying on the opinion of Ballard as to what the wool would sell for in the future.

A representation, or statement, which merely gives the opinion, the judgment, or expectations of the maker as to the price that property will sell for in the future, even though erroneous, is not actionable, because a person is not justified in relying upon the same. General assertions as to value, the price which has been offered for property, or that it is desirable, or that it will sell for a greater price in the future, are so commonly made and often so much exaggerated that they are known as "dealer's talk," and they are not to be relied

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upon as statements of fact. The expression of an opinion as to a price which is liable to be fixed in a future and fluctuating market has never, so far as we can learn, been held to form a basis for action for fraudulent representations. If it were, the courts would be clogged with actions respecting mistaken opinions as to the future price of grain, or of goods and merchandise sold upon the open market.

AFFIRMED.

CLEMENT OLMSTED, ET AL., APPELLANTS, V. JULIA A. CALDWELL ET AL., APPELLEES.

FILED MARCH 27, 1923. No. 22292.

1. **Contracts.** In order to constitute a contract, for the breach of which damages may be recovered, the minds of the parties must have met upon every essential element of the contract, leaving nothing open to be determined by future arrangements, unless the contract itself so provides.
2. **Vendor and Purchaser: CONTRACT: EVIDENCE.** Evidence examined, and *held* not to establish that a contract of sale of land was entered into between the plaintiffs and defendants.

APPEAL from the district court for Saline county:
LEONARD W. COLBY, JUDGE. *Affirmed.*

R. M. Proudfit, for appellants.

B. V. Kohout and *L. O. Williams*, *contra*.

Heard before MORRISSEY, C. J., LETTON, ROSE, DAY and DEAN, JJ., RAPER, District Judge.

LETON, J.

This is an action brought to recover damages for the breach of an alleged written contract for the sale of land, alleged to have been made by the exchange of certain letters between the plaintiffs and defendants. A jury was waived and the cause tried to the court, which found generally for defendants. Plaintiffs appeal.

The first letter was written May 7, 1919, by Clement

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Olmsted to the defendant, Julia A. Caldwell, and is as follows:

"Mrs. Julia Caldwell:

"Just a line in regarde ove that farm ove yours that joins Tobias I under stand that you would like to Sell it ef you od Drope me aline and let me know what the least dollar that will buy it and what Termes that you want and I will try and Find a buyer. Let me know in a few days, if you do not care to sell or if you do I think I can get 130 on acre and maybe 135.

"Frome Clement Olmsted, Friend, Nebr.

"P. S. Dont waite to long if you care to sell as I think I can sell this farm."

This letter evidently solicits an agency to sell the land and is not an offer to purchase. Mrs. Caldwell in return wrote Mr. Olmsted: "In regard to selling the farm if you will write my son in Peoria he will correspond with you and explain as to what you want to know"—giving his address. On May 15, 1919, plaintiffs, in the name of Olmsted Bros., wrote defendant John F. Caldwell as follows:

"Dear Sir:

"I have written to your mother about her farm near Tobias, Nebr., and she has requested that I write you about it. I believe I can find you a buyer at around \$130 to \$135 per acre if you can give good terms and would expect you to pay me a commission in case I make a sale for you. Please let me hear from you return mail. Yours truly,

"Olmsted Bros."

On May 17, 1919, John F. Caldwell answered as follows:

"Gentlemen:

"I have your letter of May 15th in regard to price on my mother's farm near Tobias. Will say this farm is for sale but will have to net her \$150 per acre; \$10,000 cash, the balance a first mortgage and would not be willing to give you more than thirty days option at

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this price. Yours truly,

“Jno. F. Caldwell.”

In response to this letter, in May, Caldwell received a letter from a banker inclosing contracts of sale, in duplicate, between Julia A. Caldwell and Clement Olmsted, signed by Clement Olmsted, and asking Caldwell to have his mother sign and return the contract as soon as possible, also requesting abstracts to be furnished. On May 31 John F. Caldwell wrote Olmsted Bros., as follows:

“Gentlemen:

“I am returning contract and check submitted by C. Olmsted. On consulting the various heirs of my father’s estate, I find that they do not care to consider selling at this time. You doubtless are aware of the fact that mother has only a life estate in the land and cannot sell without the consent of all the heirs. Moreover, the terms of the contract as submitted would not be satisfactory to mother even had the other heirs been willing to sign. Therefore you may consider negotiations at an end. Very truly yours,

“John F. Caldwell.”

Clement Olmsted testified that, at the time the letters to Mrs. Caldwell and to John F. Caldwell were written, he knew the value of the land was about \$200 an acre, and it was stipulated “that at the time of writing said letters and for 40 days thereafter said land was worth \$200 an acre, and there were 220 acres of land in that tract intended to be purchased.”

At the conclusion of the testimony of Clement Olmsted, who was the only witness examined, both parties rested.

It is very apparent that, in the letters which initiated the correspondence, plaintiffs were soliciting employment as commission agents to sell the land. The purport of the letter of John F. Caldwell, dated May 17, was to accept their services, but fixing a different price than that suggested by them. Occupying the re-

lation of agents, it was the duty of plaintiffs, if they desired to purchase for their own account, to fully and fairly disclose to their principals the actual facts with respect to the value of the land and their desire to purchase for themselves. At the time these letters were written they knew that the land was worth \$200 an acre; they were endeavoring to obtain it for \$130 or \$135 an acre, and finally attempted to buy it themselves at the price of \$150 an acre, without disclosing its true value. Even if the letters are construed as a definite contract for the sale of the land, a contract entered into under such circumstances would be subject to rescission by the vendor upon obtaining knowledge of the true facts.

It is claimed, however, that, since Mr. Caldwell assigned as a reason for refusing to enter into the contract the fact that the heirs were not willing to sell and that his mother only had a life estate in the land, he cannot afterwards change his position by alleging that the relation existing between the parties, if any, was that of principal and agent. Even if this be granted, the evidence does not establish that the minds of the parties ever met as to all the necessary elements of a contract. The time for which the mortgage was to run, the rate of interest on deferred payments, the number of acres to be sold, the gross price for the property, and the time and place of payment, are not mentioned in the letter of Mr. Caldwell. In addition to this, the time of possession, the nature of the title to the property which must be shown by the abstract, or even whether an abstract was to be furnished, were all left indefinite. The contract submitted by Mr. Frantz contains a number of these elements which were lacking in the letter of May 17 of John F. Caldwell, and constituted in fact a counter proposition to Caldwell which was never accepted by him. In order to constitute a binding contract, it is essential that the minds of the parties meet at every point, and that nothing be left open for ar-

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rangements to be made in the future, unless, as sometimes happens, the contract itself makes provision for the ascertainment and insertion in the contract, as finally written, of some fact which may and is to be made certain before final consummation. *Krum v. Chamberlain*, 57 Neb. 220; *Lopeman v. Colburn*, 82 Neb. 641. The minds of the parties never met upon the same intention, no common assent was made to the same contract, and hence there was no right of action on the part of the plaintiffs.

The judgment of the district court was clearly right and is

AFFIRMED.

SAMUEL KENNEDY, APPELLEE, V. ARAH L. HUNGERFORD,
APPELLANT.

FILED MARCH 27, 1923. No. 22314.

1. **Bills and Notes: ANSWER: DEMURRER.** An answer which sets forth a contemporaneous agreement varying the terms of a written contract which is the subject of the suit, but from which it does not appear, either expressly or by necessary intendment, that such agreement was oral, is not vulnerable to a general demurrer.
2. ———: **ACTION: ABATEMENT.** The answer to an action at law upon a promissory note pleaded in substance that the note was secured by a mortgage upon real estate, and that, at the time the note and mortgage were executed, the payee agreed with the maker that he should not be liable personally upon the note until the remedy provided by the mortgage against the land had been exhausted, and that he should only be liable for any deficiency which might result after the application of the proceeds of a sale of the land under the mortgage had been applied upon the debt. *Held* that as between the original parties such an agreement, if adequately proved, would abate the action upon the note until the condition of the agreement had been fulfilled.
3. ———: ———: ———: **PURCHASER WITH NOTICE.** In such a case, if the holder of the note purchased it with full knowledge of such agreement, he stands in the shoes of the original payee, and is not entitled to enforce the note until the payee himself might do so.
4. ———: **ANSWER: DEMURRER.** Such facts, if alleged in an answer,

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and supported by adequate proof, are sufficient to constitute a defense of the nature of a plea in abatement to an action at law upon the note, and to establish that the action was prematurely brought. Such an answer is not vulnerable to a general demurrer.

APPEAL from the district court for Dawes county:
WILLIAM H. WESTOVER, JUDGE. *Reversed.*

J. E. Porter, for appellant.

E. D. Crites and *F. A. Crites*, *contra*.

Heard before MORRISSEY, C. J., LETTON, ROSE and DAY, JJ.

LETTON, J.

This was an action upon a promissory note signed by the defendant, Hungerford, and payable to Joseph Acker. Plaintiff alleges that the note is past due and unpaid, and that he was a purchaser in good faith before maturity.

The answer of the defendant, Hungerford, is of the nature of a plea in abatement. In substance, it is to the effect that Hungerford is a real estate broker; that defendant Acker was the owner of a tract of land which he desired to sell; that Acker, desiring to remove from the state, conveyed the land to Hungerford as a nominal purchaser for the purpose of sale by Hungerford; that Hungerford gave to Acker the note in suit secured by a mortgage upon the real estate; that Acker and Hungerford agreed that Hungerford should not be liable personally upon the note until Acker had exhausted the remedy given by the mortgage against the land, or its purchaser if sold, and should only be liable for any deficiency, and that the land had been sold to one Finney who had assumed and agreed to pay the debt and is able to pay it. It is also alleged that before plaintiff purchased the note he had full knowledge of this agreement, and that he is not entitled to enforce the note against Hungerford until he has exhausted his remedy against the land and its purchaser. A gen-

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eral demurrer to the answer was sustained and judgment rendered for plaintiff. Defendant appeals.

There can be no question but that, if adequate proof were made in an action between the original parties to the note and mortgage, that they had entered into such an agreement at the time of the making of the instrument, such an agreement would be valid and enforceable. Of course, in the absence of such an agreement there is no obligation upon the part of the mortgagee to foreclose the mortgage before beginning an action at law upon the note which it is given to secure. *Grable v. Beatty*, 56 Neb. 642; *Meehan v. First Nat. Bank*, 44 Neb. 213.

The question presented here is whether such an agreement has been sufficiently pleaded. In the *Grable* case the defendant pleaded various provisions of the mortgage, and alleged that the mortgagee agreed with defendant that if default was made he would foreclose the mortgage on said real estate and sell the same to pay said debt, "all of which the plaintiff well knew when he purchased said note, *as shown by said special stipulations* so accepted by him from said Green." The court said: "By the foregoing allegation it was evidently the intention of the pleader to state a conclusion deduced by him from the facts antecedently averred. Those facts do not sustain his conclusion," meaning that the pleader relied upon the mortgage to set forth the agreement, and that no such agreement was contained among its provisions. The case does not hold that competent evidence of a contemporaneous written agreement could not be received to establish the fact alleged.

Some courts hold that an allegation that parties entered into a contract, without stating whether it was oral or in writing, is sufficient in *any* pleading. *Bradford Investment Co. v. Joost*, 117 Cal. 204; *Tucker, Exr. v. Edwards*, 7 Colo. 209. Others hold that such an allegation in a declaration, or petition, is sufficient against

a demurrer, but is insufficient in an answer, where the contract, or agreement, pleaded is void unless it is in writing (*Reinheimer v. Carter*, 31 Ohio St. 579), the reason given for the latter view being that defendant must plead facts which disclose to the court a valid defense to plaintiff's cause of action, and that an agreement not shown to be valid on the face of the plea is no defense. But it seems to us that a petition which fails to allege a valid contract, when the law requires it to be in writing, is equally faulty. Such an agreement if not in writing might violate the rule which prohibits parol evidence to vary the terms of a written contract, and of course this objection might be waived if not made at the trial. The plea in the answer is sufficient to admit proof that the agreement was in writing. If information as to whether the agreement was in fact in writing was desired, a motion for more specific statement should have been made. We cannot assume that the defendant will be unable to establish the existence of such an agreement by competent evidence. *Tablet & Ticket Co. v. Le Feber*, 4 Neb. (Unof.) 105.

If the plaintiff was a holder of the note in due course, with no notice of any infirmity in the instrument, or defect in the title of the person negotiating it, then such an agreement between the original parties would not affect his rights. Comp. St. 1922, sec. 4663. But under section 4666: "The title of a person who negotiates an instrument is defective * * * when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." And by section 4667: "To constitute notice of an infirmity in the instrument, or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his actions in taking the instrument amounted to bad faith." If such an agreement was made, as the demurrer admits, then Acker, who negotiated the note,

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did so in breach of faith, or under such circumstances as to amount to a fraud upon Hungerford, unless he communicated all the facts to the plaintiff. Plaintiff is deemed *prima facie* to be a holder in due course, but if it is admitted that the title of Acker was defective, to plaintiff's knowledge, the same defense can be made against him as could be made against Acker.

It is not claimed that there is any defense to the merits. Defendant states that the owner of the land is ready and willing to pay the debt, but desires a release of the mortgage. While it is true, as plaintiff argues, that if Hungerford paid the judgment he would be subrogated to the mortgage lien, this would impose upon him the burden of bringing foreclosure proceedings if Finney failed to pay. This he attempted to be relieved from by the agreement with Acker. We cannot hold that the facts pleaded, if sustained by evidence, do not entitle him to an abatement of the action at law until the proceeds of a sale of the land are exhausted. Plaintiff insists that the answer does not allege that plaintiff has not exhausted his remedy against the land, and against the purchaser. It does not do so in so many words, or in strict terms; but considering the answer as a whole, it is sufficient upon that point.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

CLAUS PETERSON V. STATE OF NEBRASKA.

FILED MARCH 27, 1923. No. 23089.

Intoxicating Liquors: INFORMATION: SUFFICIENCY. "In a prosecution under chapter 187, Laws 1917, for having possession of intoxicating liquor, the information need not negative the exceptions under which its possession may be lawful, but these are available in defense." *Fitch v. State*, 102 Neb. 361.

ERROR to the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Affirmed*.

D. W. Livingston, for plaintiff in error.

O. S. Spillman, Attorney General, and *C. L. Dort*,
contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and
DAY, JJ.

LETTON, J.

Plaintiff in error was convicted of a violation of the prohibitory law, and it was also charged that he had formerly been convicted twice of a violation of the liquor laws. He pleaded not guilty, and, after a verdict of guilty, filed a motion in arrest of judgment and a motion for a new trial, which were both overruled and sentence imposed.

The first error assigned is that the information does not state facts sufficient to charge the defendant with a violation of the law. The argument is that, since a person may have liquor in his private dwelling house in a reasonable amount for personal use and needs, the place of the possession ought to be stated in the information, and the fact alleged that it was not in his private dwelling house.

In *Fitch v. State*, 102 Neb. 361, the same contention was made. It was held that in such a prosecution the information need not negative the exceptions under which the possession of intoxicating liquor may be lawful. We adhere to this construction of the statute.

The determination of this point determines also the next complaint made, which is that it was error to overrule the motion in arrest of judgment, which was based upon the contention that the information was defective in substance.

The next assignment of error is that, since the evidence showed excessive intoxication by which the accused was deprived of reason, the fact of intoxication should have been submitted to the jury in order that it might consider whether in fact a crime had been committed. A search warrant was procured to search the

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business premises of the defendant. A number of bottles were found concealed which contained intoxicating liquor, and a number of empty bottles found back of the store and in a shed attached to the store building. He was lying on the floor drunk when the officers entered the store. Afterwards he told the officers that he had bought \$270 or \$280 worth of liquor and that they had not found it all. Evidence of two prior convictions was also produced. On the witness-stand defendant testified that he had been in the saloon business; that afterwards he conducted a meat market and sold soft drinks, and was in that business at the time of his arrest; that a man from Omaha came and tried to sell him some liquor, but he did not buy any; that this man gave him two or three drinks; that he became intoxicated and remembered nothing more until he found himself in a cell.

Under this evidence the district court was justified in refusing the requested instructions as to the effect of the intoxication of the defendant.

AFFIRMED.

NELSON S. MERCER ET AL., APPELLANTS, V. PAYNE & CARNABY COMPANY ET AL., APPELLEES.

FILED MARCH 27, 1923. No. 22260.

1. **Specific Performance:** CONTRACT FOR LEASE. A petition for the specific performance of a contract obligating defendants to lease building lots from plaintiffs for the term of 99 years is not necessarily demurrable as indefinite and uncertain because the contract contains a provision that the lease shall contain the "usual conditions" of a 99-year lease.
2. **Customs and Usages.** A usage relating to conditions of a 99-year lease may be a provable fact.
3. **Landlord and Tenant:** CONTRACT FOR LEASE. A contract to lease building lots for 99 years is not unenforceable merely because the owner of the fee reserves the right to approve the form in which the terms of the lease, as fixed by the parties, are to be couched.

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APPEAL from the district court for Douglas county:
ARTHUR C. WAKELEY, JUDGE. *Reversed.*

William H. Herdman, for appellants.

William Baird & Sons, *contra.*

Heard before LETTON, ROSE and DEAN, JJ., RAPER,
District Judge.

ROSE, J.

This is a suit in equity for the specific performance of a contract obligating defendants to lease from plaintiffs three building lots for 99 years. The trial court sustained a demurrer to the petition on the ground that the contract is indefinite and uncertain in its terms. From a dismissal of the suit plaintiffs have appealed.

There is nothing presented by the appeal except the sufficiency of the petition to state a cause of action for specific performance. The contract was executed and delivered. A copy is attached to the petition. Plaintiffs received \$2,500 as part of a stipulated cash payment of \$15,000 to be paid within 60 days. The lots were described in the contract. The following terms, among others, were definitely stated in the agreement by defendants to enter into the lease: Period of tenancy 99 years; annual net rental for the first ten years, \$6,000; annual net rental for the second ten years, \$6,900; annual net rental for the last 79 years, \$8,000; option to purchase at stated times for specific amounts.

In addition to other terms, the contract contains an expression in this form: "The lease to contain the usual conditions of a ninety-nine year (99) lease." This clause as it appears on the face of the contract is the principal ground of demurrer. It is argued by defendants that the contract thus appears to be too indefinite and uncertain for enforcement by specific performance. The position is untenable. The words, "usual conditions," in the connection employed, refer to a usage or course of dealing on conditions applicable

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to the making of 99-year leases. By inserting the phrase quoted, both parties recognized the existence of a usage conforming to conditions having a definite import. For the purposes of the demurrer, it is proper to infer that the parties, in a matter of such magnitude, acted in good faith with reference to a usage which does not leave in doubt the "usual conditions" of a 99-year lease. Usage in this sense is a provable fact and is so understood by courts of equity. It is different from a custom having the effect of law. For anything appearing on the face of the contract or the petition, the provision assailed as indefinite and uncertain may be reduced by evidence to definite terms. In respect to this phase of the contract for the lease, the petition contains the plea that "the usual terms and conditions of said lease were fully and finally agreed upon by and between these plaintiffs and defendants." In addition, the "usual conditions" to which the parties are alleged to have agreed are specifically set out in a form of lease attached to the petition. The issue is one of fact and not of law. This is an instance for the application of the familiar rule declaring, "That is certain which by necessary reference is made certain." Sufficient evidence of "usual conditions" of a 99-year lease, to which the parties agreed, will, in that particular, leave nothing open for negotiation. The petition, therefore, is not demurrable on the ground that the contract pleaded is indefinite and uncertain in the respect mentioned.

It is further argued that the contract is not enforceable, because it is therein stated the form of the 99-year lease is to be approved by the owner of the fee. This condition relates alone to the approval of the form in which the terms of the lease, as fixed by the parties in their preliminary contract, are to be couched. It does not authorize the lessor to change in any manner the terms on which the minds of the parties met, when they entered into their contract for the lease. The sus-

taining of the demurrer cannot be justified on this ground.

Other grounds of demurrer are suggested, but no substantial reason has been found for holding that the petition does not state facts sufficient to constitute a cause of action for specific performance. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

HOME LUMBER COMPANY, APPELLEE, V. CHARLES GUNDERSON ET AL., APPELLANTS.

FILED MARCH 27, 1923. No. 22297.

Mechanics' Liens: SUFFICIENCY OF EVIDENCE. Evidence outlined in opinion *held* sufficient to establish a lien on leased premises for materials ordered by a tenant for permanent improvements.

APPEAL from the district court for Cheyenne county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

W. P. Miles and Halligan, Beatty & Halligan, for appellants.

Radcliffe & Hyde, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., RAPER and TROUP, District Judges.

ROSE, J.

This is a suit to foreclose a lien for materials used in the construction of a concrete addition to a brick building on lot 5, block 2, in the town of Potter. Plaintiff furnished the materials. The amount of plaintiff's claim is \$722.75, with interest. Defendants Charles Gunderson and Gustav Gunderson are owners of the lot on which the materialmen's lien was filed. The wife of each is joined as a defendant. The claim was resisted on the ground that defendants did not order or purchase the building materials or otherwise become indebted to plaintiff therefor. Upon a trial of the issues the district court rendered a decree in favor of

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plaintiff May 17, 1921, for \$801.15 including interest, and ordered a foreclosure of the lien. Defendants have appealed.

It is argued that plaintiff has no valid lien on the lot; that the materials in question were ordered and used by a lessee who had no authority to obligate defendants for the payment of an indebtedness thus incurred or to incumber the leased premises; that there is no evidence of any agreement or conduct on the part of defendants which subjects their lot to a lien in favor of plaintiff; that therefore the decree of foreclosure is erroneous. Are these proper deductions from the evidence and the law applicable to the facts?

When Charles Gunderson, defendant, was sole owner of the fee, December 12, 1918, he leased the lot to J. F. De Lair for a term of years at a monthly rental of \$32.50. There was then a brick building on the lot. Under the lease De Lair and A. E. Buckley, as partners, used the leased premises for a garage and repair shop. Between February 24, 1919, and April 28, 1919, a concrete addition to the brick building was constructed with materials furnished by plaintiff, the charges for the items aggregating \$722.75. Not long after the improvements were made De Lair and Buckley left the country and defendants took possession of the leased premises.

There is evidence tending to prove the following facts: The lessor, under a clause of the lease, granted to lessee the privilege of constructing a building in addition to the one already on the lot. De Lair and Buckley took to the office of plaintiff, a corporation dealing in building materials at Potter, a list of the materials desired. At different times while they were in plaintiff's office Charles Gunderson was there discussing the proposed building. The estimates for the materials were made for Gunderson and Buckley. The delivery slips and the book entries of plaintiff show Gunderson and Buckley to be the purchasers. Charles

Gunderson authorized them to apply the monthly rentals on plaintiff's bill and never refused payment until after De Lair left Potter. The first plaintiff knew of Charles Gunderson's denial of liability was his refusal to sign a note for the amount due, saying he wanted to impress lessee with the latter's responsibility, and assuring plaintiff it need have no concern about eventually getting its money. Charles Gunderson paid the contractor for the labor of the workmen. The materials furnished by plaintiff were used on the lot and defendants accepted the benefits of the improvements. The entrance to the brick building was through the addition constructed with the materials furnished by plaintiff. The concrete building does not indicate a temporary structure erected by tenants with a view to its removal upon the expiration of the tenancy. These facts and conclusions seem to be proper deductions from the evidence in view of the surrounding circumstances, though there is other proof of a different import.

If the evidence does not justify a finding that Charles Gunderson was a party to the purchase of the materials, as argued by defendants, it proves that he ratified the transactions of his tenants in making permanent improvements on his lot. In his lease he authorized the construction of the building. He permitted the tenants to order the materials in his presence under circumstances implying his consent. He directed his tenants to pay the bills with the rentals—his own funds. He took whatever rights his tenants had acquired under his tenancy. He paid the contractor for the labor of the workmen who constructed the addition and took the benefit of the materials and labor in the form of the permanent improvements. Such conduct, in connection with the other facts and circumstances outlined, amounts to a ratification which subjects the lot and the improvements to a lien in favor of plaintiff. The decree of foreclosure responds to the demands of equity

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and justice. The pleadings and proof show that defendant Gustav Gunderson acquired his undivided half interest in the lot subject to the equities of plaintiff. No prejudicial error has been found in the record.

AFFIRMED.

CHARLES L. SHARP, APPELLEE, v. CHICAGO, BURLINGTON
& QUINCY RAILROAD COMPANY ET AL., APPELLANTS.

FILED MARCH 27, 1923. No. 22152.

1. **Highways: OBSTRUCTIONS: LIABILITY OF COUNTY.** A county cannot evade statutory liability for damages arising out of an obstruction in a highway by a plea that the repair and upkeep of such highway at the point where the injury occurred has by the county been delegated to another.
2. ———: ———: **DANGER SIGNALS.** When a railroad company for its own convenience places an obstruction in a highway where automobiles and other vehicles are accustomed to pass, it is its duty to place lights or other suitable warning signs upon such obstruction that the public may be warned of danger.
3. ———: **NUISANCE: POWER OF LEGISLATURE.** It is elementary that the legislature cannot vest county authorities with power to permit the installation of a structure in a public highway which amounts to a public nuisance.
4. ———: **OBSTRUCTIONS: INJURIES: LIABILITY.** Where a personal injury grows out of the negligent continuance of an obstruction permitted by a county to be placed in the highway, such county and the person or corporation which erected the obstruction are jointly liable for personal injuries arising therefrom.
5. ———: ———: **DANGER SIGNALS.** Where a county board permits an obstruction to be placed in a public highway and, in the plan which provides for such construction, no reference is made to the installation of lights or other contrivances to apprise persons of danger in the nighttime from driving into such obstruction, it should not be held that such county board had planned or ordered that such warning signs should not be installed.
6. **Appeal: AFFIRMANCE.** Where, in a personal injury action, the jury are properly instructed on the question of comparative negligence, and there is sufficient evidence to justify a finding either way, the verdict in such case should not for that reason be disturbed.

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APPEAL from the district court for Lancaster county:
ELLIOTT J. CLEMENTS, JUDGE. *Affirmed.*

Byron Clark, Jesse L. Root, J. W. Weingarten, Max V. Beghtol, Charles E. Matson, Harry R. Ankeny and Max G. Towle, for appellants.

Burkett, Wilson, Brown & Wilson, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE, ALDRICH, DAY and DEAN, JJ., RAPER, District Judge.

DEAN, J.

Plaintiff, as alleged, was driving east in an automobile on a highway about five miles west of Lincoln. The highway is a continuation of west O street, one of Lincoln's main business thoroughfares, and is a part of the road then known as the Omaha, Lincoln and Denver highway. The highway is paved for about eight miles west of the city, and at a point about five miles west of the corporate limits it intersects a crossing of defendant railroad. In 1918 the railroad tracks were elevated several feet at the street intersection and a railroad bridge was constructed by the company over the highway to permit travel on the street thereunder. The subway under the track was also constructed by the railroad company. The bridge is supported by large timbers or pillars in the center of the subway, midway between the north and south borders of the paved highway. As plaintiff approached from the west his car ran into the company's central bridge support, and from the resulting impact he received serious personal injuries and his car was damaged.

Alleging that Lancaster county was also liable in that it negligently permitted the railroad to construct the bridge in a negligent manner, in that the supports were placed in the center of the road without any warning sign, plaintiff made the county a party defendant. For the personal injuries so sustained, and for the damage to his car, plaintiff recovered a verdict and

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judgment for \$6,750. Defendants appealed separately.

Plaintiff was an insurance solicitor. Before the accident he earned about \$5,000 or \$6,000 a year. He was then aged 51 years. With respect to his injuries he testified in substance that in the evening of October 8, 1920, he was driving alone to Lincoln in a Ford car; that he reached the intersection in question about 7:30 or 8 o'clock; that the night "was very dark and windy," and the "weather was very dry at that time and the dust was very bad." With respect to the immediate happening of the accident he testified:

"Well, I was on the paving and it was very dark and very dusty. The dust would come in waves, and I met several cars, and when I would meet those cars I would pull out to the side of the street and stop and wait till they got by. Nobody turned on their dimmers because it was so dark, and it would blind a person to look in them and I would pull out and stop. Then I would pull up in the center, as near as I could, in order to keep from running off either side;" that he had never seen the Burlington bridge until the night in question, though in years gone by he had traveled the road; that he did not see the piling before he struck it with his car.

He further testified: "When I hit the piling there seemed to be a flash of light, and my face seemed to be upward and I saw what I thought was a telephone pole; and I thought I had hit a telephone pole. I never thought of such a thing as there being such an obstruction in the road. I supposed I had hit a telephone pole, looking up just a moment, a second, a flash, and that is all I know. I am all through after that." That he had no recollection of how he got home or of anything that happened until Christmas; that the accident greatly impaired his memory and his ability to recognize persons; that he had eight teeth broken, his head was badly hurt, and two pieces of bone were removed from one of his fingers; that at the time of the trial his

breathing was "congested" and that it was then hard for him to breathe; that before the injury he was strong and able-bodied and his health was good and he never had any of the trouble that continuously afflicted him since then; that at Christmas he could not yet stand on his feet; that he had driven a car a great deal for about 12 years and never before had an accident; that in his business as an insurance solicitor he traveled almost exclusively in an automobile, and that at the time the car was reasonably worth \$400, but was valueless afterward.

Before the examination of plaintiff closed it developed that his hearing was impaired, and that he was "deaf in one ear," and that he had difficulty in recalling names of persons. Plaintiff testified that he was a careful driver; that his rate of speed at the time was about 15 miles an hour, and that it was never more than 20 miles an hour on paved roads; that just before he struck the pier the dust whirled around so that he could not see 6 feet ahead.

Ralph Cox, a young man living 300 or 400 feet south of the intersection testified that he heard the car strike against the piling about 7:30 or 8 o'clock; that he saw the headlights of a car about 200 feet away coming from the east just a few seconds before the impact; that by the sound he thought the two cars must have collided; that he and his brother found plaintiff sitting in his car leaning forward over the steering wheel, which was in an upright position and evidently bent forward; that plaintiff "seemed to hold his chest; his hand was bleeding slightly and one limb;" that there was no warning signal at the bridge, but the piling was painted white, and that after the accident a danger signal was placed in the center of the piling. Subsequently all of the evidence respecting the "changed condition," to which the witness testified, was stricken out and the jury were instructed not to consider it at all.

The testimony of Ralph's brother, Ray, with respect

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to plaintiff's condition, was substantially to the same effect, and also that of Robert Cox, the father of the young men. The latter testified, however, that the first thing he remembered hearing plaintiff say was that he did not see the piling; that plaintiff insisted that he could get out of the car without help, but he could not do so and had to be helped until he got almost to the car in which he was taken home, "then he seemed to kind of faint away." It appears from the evidence of Mr. Cox that as the bridge is approached from the west two large danger signs have to be passed and they are visible at night with the aid of ordinary automobile lights.

Three physicians were called who had attended plaintiff. Another testified as an X-ray expert. Dr. Bently, a physician of about 40 years' experience, testified that when he was called to plaintiff's residence, the night of the injury, he found him bruised and delirious; that he bandaged three fractured ribs and both lower limbs; that the back of his neck was bruised, stiff, sore and swollen; that this condition continued several weeks; that he had a glass cut near his right eye and another on the jaw and chin and a severe gash on the right leg between the knee and the ankle, and he was bruised on the left leg and on the middle finger of the right hand; that he suffered considerable pain and had to be kept under opiates; that his back was strained, "so that he had to be lifted up and down on account of the pain and soreness in the lumbar region; the chest was pretty sore, tender to touch and difficult breathing; his neck was stiff and he could not turn his head either way for two or three weeks. He had to be raised up. After we got him out of bed he had to be raised up in an elevated chair for quite a while in order to sit up at all." and he was unable to walk.

The evidence of the other two physicians substantially corroborated Dr. Bently's evidence, and one of them who was subsequently called to treat plaintiff for a con-

siderable period testified that the patient's right leg was broken and that one limb was swollen "about a quarter larger than the other." This physician testified that up to the time of the trial, which was a little more than six months after the accident, he was still "treating him for the general stiffness and inability to get around."

Plaintiff's wife testified that for 11 weeks or thereabouts her husband had to sleep in a chair, and for all of that time he was unable to bear any weight on his feet, and that he had to be carried from one chair to another; that he did not get out of the house until the second week in January and then only to the front porch.

In respect of the installation of the subway under the proposed railroad bridge, the county alleges that sometime in December, 1917, a letter was addressed by defendant railroad to the county surveyor which was by that official referred to the board of county commissioners. The contents of the letter are not shown, but from the tone of a resolution of the board, dated December 12, 1917, it appears that it purported to relate, in a very general way, to a proposed creation of a subway, under the railroad, at the intersection where the accident occurred. Following the receipt of the letter the board adopted a resolution which is incorporated in the respective answers of both defendants. The resolution, so far as material here, follows:

"Resolution. Whereas, a letter of December 11, 1917, to Arthur E. Edgren, county surveyor of Lancaster county from the Chicago, Burlington & Quincy Railroad Company, has been referred by the said Arthur E. Edgren to this board, and whereas, it is desirable that official action be taken regarding the proposed subway on the O. L. & D. road west of Cushman and east of Emerald referred to in said letter: Therefore be it resolved by the board of county commissioners of Lancaster county, Nebraska, in regular session this 12th day of December, 1917, that it is the sense of said

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board that the following plans would be acceptable: First. That the Chicago, Burlington & Quincy Railroad Company construct in 1918 a double subway for vehicles, each opening sixteen feet wide and fourteen feet high with an eighteen inch drainage opening below the ground. Second. That the Chicago, Burlington & Quincy Railroad Company do all grading on its right of way for such subway, also bear the expense for the extra amount of pavement necessary to fit the double sixteen-foot opening rather than a normal width of paving eighteen feet as is provided on the rest of the road, but only so much of said extra paving as shall be on the Chicago, Burlington & Quincy Railroad right of way. * * * Fourth. This board on its part to abandon the present grade crossing during the construction period and after the subway is completed to abandon the grade crossing permanently. * * * Sixth. After the completion of the subway on the Cox crossing (presumably the crossing in question) this board will take action and consider the closing of road No. 604 over the Chicago, Burlington & Quincy Railroad track; provided that a proper petition is filed therefor, or when this board is vested with jurisdiction in the premises. Seventh. The Chicago, Burlington & Quincy Railroad to retain to itself control for grant of wires or other structures through the opening so that safety of the public and of the railroad company can be provided for, and to retain also control of the advertising features afforded by the walls of the subway so as to keep the structure free from objectionable matters."

The county denies liability, and in support of its contention cites 7 Am. & Eng. Ency. of Law (2d ed.) 947. and Elliott, Roads and Streets (3d ed.) 535. The cited authorities merely hold that a county cannot be held liable for a negligent breach of duty respecting the care of public highways where there is no statute creating the liability. But in Nebraska we have such a statute, so that the cited authorities are not in point.

Section 2746, Comp. St. 1922, provides: "If special damage happens to any person, his team, carriage or other property by means of insufficiency, or want of repairs of a highway or bridge, which the county or counties are liable to keep in repair, the person sustaining the damage may recover in a case against the county. * * * Provided, however, such action is commenced within thirty days of the time of the injury or damage occurring." *Hollingsworth v. Saunders County*, 26 Neb. 141; *Swift v. Sarpy County*, 102 Neb. 378; *Iliggins v. Garfield County*, 107 Neb. 482.

Failing in that defense the county attempts to evade statutory liability by a plea that the repair and the upkeep of the road was delegated to another. But that is no defense. In Iowa it was held that the county's duty to maintain an approach to a bridge and to keep it in reasonable repair "cannot be so delegated to others as to relieve the county from liability if the approach should be negligently constructed or negligently permitted to become out of repair." *Clark v. Sioux County*, 178 Ia. 176; *Bethel v. Pawnee County*, 95 Neb. 203; *Early County v. Fain*, 2 Ga. App. 288; *Interurban R. & T. Co. v. City of Cincinnati*, 94 Ohio St. 269; *Harri-man v. Moore & Co.*, 74 N. H. 277. In *Brengman v. King County*, 181 Pac. 861 (107 Wash. 306), where the court had under consideration an injury that arose from the removal of a barricade in the highway which was being repaired, the court said: "It is the duty of a county to show such lights, around a place where an obstruction exists and where automobiles are accustomed to pass, that one approaching can see that a dangerous condition exists." And this rule, as pertaining to railroad crossings, is particularly applicable to a highway in the open country where rules of the road cannot be strictly supervised.

To establish its nonliability the railroad company, *inter alia*, insists that the plan for the construction of the bridge, as built, was submitted to and approved by

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the county authorities, and that the subway was excavated and the bridge built pursuant to such plan. Hence, it argues that as to its liability does not attach.

Aside from the point of law involved, we do not think the evidence of the company itself on this point, when fairly construed, sustains the argument. The county engineer, who is also county highway commissioner, testified that, as such, he was "in charge of the construction and maintenance of the roads and bridges in the county." He also testified that a plan of a proposed bridge was submitted to him by the railroad company, which he examined, and that he conferred with the county board with respect thereto. He was then asked if he "observed whether it was built according to those plans * * * and according to the resolution passed by the board? A. It was not built according to the first plan submitted. * * * Q. What were those first plans? A. The first plan was for a permanent concrete structure. Q. Was that later abandoned? A. Yes, sir. * * * Q. Did you confer with the engineers of the Burlington regarding the abandonment of that? A. Yes, sir. Q. Do you know why the plan was abandoned? Mr. Wilson: Plaintiff objects unless he shows the source of his information. Court: Overruled. Yes, or no. (Exception.) A. I do. Q. You may state why. Mr. Wilson: Plaintiff objects because it is now apparent that he got his information from the engineers of the Burlington, which would be hearsay. (Objection overruled. Exception.) A. Because it was vetoed by the director general of railroads at that time." When asked if he conferred with the board of county commissioners regarding the double passage way plan under the bridge, he testified: "I think I did."

It is to be noted that while on his direct examination the county engineer testified that the resolution of the county board, in evidence, referred to the bridge that was finally constructed, on the cross-examination he testified: "Q. At the time the county commissioners

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passed this resolution the only plan that had been submitted up to that time was for the concrete bridge, was it not? A. I don't remember, but it probably was. I don't remember." So that it fairly appears, as plaintiff contends, that there was evidence before the jury upon which it might reasonably conclude that the plans of the bridge structure which was finally built had not been submitted to the board when the resolution was passed. Anyhow it was a question of fact for the jury.

There is evidence, as hereinbefore noted, tending to prove that plaintiff had no knowledge of the existence of the obstruction until he struck it. It was further shown that at a point 50 feet west of the bridge, at the edge of the paving, there was "a large concrete sign on the right-hand side of the road some four or five feet across," and that the word "danger" was cut into the concrete. The evidence on this point, which was developed by defendant on the cross-examination, would tend to support a finding by the jury that the danger sign was an admission on the part of defendant that the obstruction which it placed in the road was a menace to travelers passing that way. This evidence and the evidence that the lights on plaintiff's car were thrown directly in front, and also the evidence in respect of the dust storm and the darkness and the flash of light, evidently from the car which approached from the east, and which momentarily blinded plaintiff, all taken together doubtless tended to convince the jury that the negligence of the defendants was the proximate cause of the accident. It is elementary that the public may assume that those who are charged with the maintenance of highways have performed their duty.

In *Robertson v. Monroe*, 116 Atl. (N. H.) 92, the court held: "A person injured by the dangerous approach to a highway, created by act of the selectmen some time before, may allege both the original negligence in creating the danger and the negligent failure to erect barriers or place lights, and may recover for

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whichever negligence the proof shows was the proximate cause of the injury, though a finding that failure to guard was the cause would preclude recovery for the original wrong."

In *Town of Mt. Pleasant v. City of New York*, 191 N. Y. Supp. 741, it is said: "A structure designed to carry an aqueduct across a highway consisting of solid masonry and earth embankments extending into the highway about 33 feet on its westerly side and about 13 feet on the easterly side, leaving a roadway under the arch of but 20 feet, is a public nuisance unless legal authority exists therefor. * * * It is not within the power of municipal authorities to consent to the occupation of a public highway by a permanent structure amounting to a public nuisance, nor is it within the power of the legislature to vest them with such power."

That the question of contributory negligence in a like case, was one of fact for the consideration of the jury is pointed out in *Corcoran v. City of New York*, 188 N. Y. 131. See, also, *Chisholm v. State*, 141 N. Y. 246; *Flynn v. Town of West Hartford*, 98 Conn. 83; *Kelsea v. Town of Stratford*, 118 Atl. (N. H.) 9.

In *Stone v. City of Seattle*, 70 Pac. 249 (30 Wash. 65) it was held: "A city cannot escape liability for injury from a defective sidewalk because the defect is part of the original plan, of construction. Whether a city is negligent in placing an electric light so that the shadow of the pole supporting it conceals a hole in a sidewalk is a question for the jury."

Very respectable authority holds that, even though the defect is in the plan, as distinguished from the mode of execution, such fact will not relieve from liability. *Schrader v. City of Port Huron*, 106 Mich. 173; *City of Circleville v. Sohn*, 59 Ohio St. 285.

In *City of Chicago v. Seben*, 46 N. E. 244 (165 Ill. 271) it was held: "A city is liable to an individual for injury received from an unsafe condition of the street, whether arising from construction of sewer according

to an adopted plan, and its failure to remedy it, or from failure to repair defects arising after construction of the sewer."

In *Sebert v. City of Alpena*, 43 N. W. 1098 (78 Mich. 165) it was held: "Laws Mich. 1887, p. 345, requiring cities to keep streets reasonably safe and fit for travel, applies to a defect in construction as well as to neglect to repair; and the safety required extends to travel by night as well as by day." See *City of Dayton v. Taylor's Administrator*, 62 Ohio St. 11.

In *Perrotti v. Bennett*, 109 Atl. 890 (94 Conn. 533) it was held: "Although the state or highway commissioner could not be held liable for error in the adoption of a plan of highway construction whereby a sewer was improperly covered for heavy traffic, there was liability for the negligent continuance of such a condition, resulting in injury to plaintiff's motor truck." In the body of the opinion it is said that, when the plan in its execution creates a nuisance or causes direct injuries to another, liability follows for the damage done. The court further observed: "If the plan be defective from the beginning, or if its defect originate shortly after the completion of the improvement and injury be ultimately necessarily the inevitable or probable result, the municipality will be liable. Clearly this is just. Upon this assumption the city created the defective improvement and either knew of it or was chargeable with knowledge of it. Every moment of its continuance was an act of negligence by the municipality. The injury grew out of and was attributable to this negligent continuance and not to the plan so defectively conceived of; but to the operation of the plan after its defective condition was known or ought, in the exercise of reasonable diligence, to have been known to the municipality."

In *Gould v. City of Topeka*, 32 Kan. 485, it is said: "If a city or its governing board should order that a high and narrow embankment, with precipitous sides, should be made in a public street for the purpose that

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the travel should pass over the embankment, and should say nothing concerning railings, guards, or other barriers, and nothing concerning street lamps or other lights, to prevent persons in the nighttime from falling or driving off the embankment and thereby being injured, it should not be held that the city had planned or ordered that no such railings, guards, barriers, lamps, or lights should be used. There should be no presumption that the city authorities had ordered or planned that a public street should be dangerous." Continuing the court observed: "It should be held that the city had made no order with reference thereto; and then we would further think that if no such railings, guards, barriers, lamps, or lights were used, and thereby injury should result, the city should be held to be liable."

In *Gulf, C. & S. F. R. Co. v. Sandifer*, 69 S. W. 461 (29 Tex. Civ. App. 356) it is said: "Where a railroad company constructs on its right of way a bridge over a ravine, together with approaches; the bridge and approaches being likewise in, and constituting a part of, the roadway of a city street; the whole leading up to the railroad crossing; and one of the approaches is dangerous to travelers, from want of a guard rail to prevent falling over its side into the rocky ravine, nine feet below, both the city and the railroad company are liable for injuries to travelers thereby occasioned."

In *People v. Delaware & H. Co.*, 69 N. E. 651 (177 N. Y. 337) it was held: "While a railroad company may carry the highway over or under its track, in its discretion, subject to its duty to restore the highway to such a state as not to impair its usefulness, the company cannot be said to have restored the highway to such a state as not to have unnecessarily impaired its use, where the restoration seriously affects its use, though it may be practicable to use it, while by restoration in another manner the use would be wholly unimpaired."

In *Harriman v. Moore & Co.*, 67 Atl. 225 (74 N. H. 277) this was said: "A traveler on a highway need not,

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to hold one placing an obstruction in the highway liable for an injury sustained in consequence thereof, show that the injury was due solely to the obstruction, if his conduct in no way contributed to the injury."

If the rule is to prevail which is advanced and practiced by defendants, with respect to the approval and the adoption of a plan of highway construction by public authorities, and the construction ultimately proves to be a menace to the public, it follows that such authorities may, by some such subterfuge, wrongfully escape liability for the installation of dangerous devices and constructions.

The rule announced in the *Gould* case and in the other cases cited herein on the same point is sound, and, pursuant to the rule, which we approve, the county authorities should not have neglected to first consider the question of safeguarding the public by the installation of lights or other warning devices, and such safeguards should have been subsequently installed. The central piers are a standing menace, an ever present peril to every passing car at a point where, in the nature of things, cars would only chance to meet at intervals.

Counsel argue generally that the pier in the center of the highway under the bridge, and at the bottom of a declivity, tends to minimize the danger of cars colliding when traveling in opposite directions. We do not think so. By the same token it could be established that an unlighted row of telephone poles placed in the center of a highway in the open country would minimize the danger of travel by night and by day.

The defendants cite *Watters v. City of Omaha*, 76 Neb. 855, but that case is not in point because the dangerous nature of the construction complained of here is obvious, and besides the erection by the company of the "danger" sign, to which reference has been made, must be taken as an admission against interest. And in this connection it may be noted in passing that the resolution

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of the county board, hereinbefore cited, shows that the railway company retained "to itself control for grant of wires or other structures through the opening so that safety of the public and of the railroad company can be provided for." In that paragraph the danger appears to have been recognized by the county and by the company, but no means were employed by either of the defendants to avert it, though the company was apprehensive concerning public safety.

The accident occurred almost two years after the war was ended, and there is nothing in the record to show that the railroad company was prevented from installing the proposed steel and concrete bridge, without central piers, after the war and before the date of the accident. And, besides, there is no competent evidence to show that the installation of a steel structure "was vetoed by the director general of railroads," as testified by the highway commissioner.

Defendants complain because the court, in its statement of the case to the jury, incorporated the major part of the pleadings in the instructions, a practice which has often been condemned by this court. But in the present case the objection is not clearly available for the reason that evidence was presented on every material allegation in the respective pleadings.

Other of the instructions have been assailed by defendants, and exceptions have been taken because certain instructions offered by defendants were refused, but we do not find prejudicial error on that feature of the case.

Defendants argue that plaintiff's negligence was the proximate cause of the accident. But the question of comparative negligence was submitted to the jury and there was sufficient evidence to justify a finding either way. It follows that the verdict should not be disturbed on that ground. The action is based upon a plain statutory provision from which, in view of the negligence complained of, there appears to be no escape. *Raasch v. Dodge County*, 43 Neb. 508; *Hollings-*

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worth v. Saunders County, 36 Neb. 141; *Roberts v. Chicago & N. W. R. Co.*, 35 Wis. 679. Every controverted fact which is material to the issues presented here was submitted to the jury by the learned trial court under instructions which are unassailable. For this court to say that the questions of fact which are involved here, any or all of them, are questions of law for the court to decide and not questions of fact for the jury to decide is to deny to that body the exercise of an ancient and time-honored prerogative. We are not prepared to go so far. *Seaton v. State*, 106 Neb. 833, at page 837.

We do not find reversible error. The judgment of the district court is

AFFIRMED.

RAPER, District Judge, dissents.

ROSE, J., dissenting.

I am compelled to dissent because it seems to me that the fundamental principles of law applicable to the undisputed facts show conclusively that there was no actionable negligence on the part of either defendant and that the injuries to plaintiff were caused solely by his own negligence.

At the place of the accident the paved highway runs under the railroad bridge. A row of piers, painted white to make them conspicuous, extends lengthwise through the center of the pavement which is divided into two roadways under the railroad track. At each side of the row of piers the driveway is as wide as the pavement by which the subway is approached from both directions. There is a perpendicular wall on each side of the subway. The piers divide the traffic in the center and keep each line of travel on the right-hand side and prevent the line in one direction from crowding the line in the opposite direction, where, on account of the walls, there is no escape from reckless drivers by leaving the pavement. The feature of highway construction condemned amounts to a mere slight bend in the road. It

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is a bend to which every traveler on the right-hand side of a highway is exposed where a wide roadway tapers to a narrow bridge. A mere bend in a road with white posts by the roadside is not a dangerous highway construction. Dividing a road into two branches, with a park, or a row of trees, or a line of poles, or a trolley between, is a safe and usual construction in country roads and in city streets, within the meaning of the law making counties liable for the negligent failure to keep highways in a safe condition for travel. This construction is within the knowledge of travelers generally and is as old as common covered bridges having two driveways with a wall between. These conditions are generally known to exist, and all mature, normal travelers of ordinary intelligence are acquainted with the facts or are chargeable with knowledge thereof. Highway travelers for generations have been exposed to the usual dangers of divided roadways and curves. No rational system of highway engineering requires counties or transportation companies, in discharging road-making duties, to construct roads without curves, or prevents the dividing of roads with rows of trees, or poles, or trolleys, or parks between, nor demands reflectors of light where these conditions exist in country places. The highway system of ancient Rome once included straight roads radiating from the Imperial City, but curves and branches are now everywhere recognized as necessary. Even in Italy a covered bridge, centuries old, with two driveways divided by obstructions, is still in use. The statute declaring section lines to be highways does not prevent necessary curves, or divisions, or branches, or justify a traveler in pursuing a straight course in the dark, never thinking of obstructions. Modern engineering skill is shown in the approaches to beautiful cities, where the highways divide and run through ornamental parks. In places like those described the failure of travelers to use their senses and observe and follow the curves of the roads and streets

not only courts self-injury or death but exposes others to extreme hazards.

The statute making a county liable for damages resulting from a failure to keep the highways in a safe condition for travel is not a public guaranty of the safety of travelers or a form of insurance to protect the reckless from the consequences of their own negligence. From a county's former immunity from suit to the affirmation of a judgment for plaintiff's injuries, seems to me to be a radical departure from the fundamental principles of law applicable to the indisputable facts.

On the face of the majority opinion itself evidence that plaintiff was injured solely as the result of his own negligence is as clear as the failure to prove any negligence of defendants.

According to the opinion of the majority the story of plaintiff, as told by himself on the witness-stand, shows that he had never before seen the bridge over the highway; that it was dark and windy, dry and dusty, the dust coming in waves; that the dust whirled so he could not see six feet ahead; that he tried to keep in the center of the road; that he "never thought of such a thing as there being such an obstruction in the road;" that he did not see the pier until he struck it; that the collision occurred when he was going 15 miles an hour.

The negligence of plaintiff and the resulting injuries are thus demonstrated by his own testimony. Going 15 miles an hour in a dust-storm which prevented him from seeing six feet ahead, he pursued a straight course, never thinking of an obstruction or a curve. Pursuing the same course elsewhere under similar conditions he would have run off the road at any bend, division, or branch, regardless of consequences. The darkness, the dust-storm and the approaching headlights were not creations of defendants, but were ordinary incidents of travel which mature, careful persons on a highway anticipate. The instinct and means of self-preservation bestowed by nature upon plaintiff were not under the control of de-

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endants. Had plaintiff exercised the attributes of normal, human existence, he would not have been injured. The notice of "danger" not far from the piers was no more an admission of faulty highway construction than the same familiar signal at any other ordinary bend in the road.

The injuries to plaintiff make a strong appeal to sympathy and charity, but do not legally create an involuntary public burden upon taxpayers whose representatives in office have been guilty of no actionable wrong; nor should the burden of plaintiff's negligence fall upon those who pay the expenses of railroad transportation. Judicial pronouncements which unnecessarily tend to weaken personal responsibility and reward carelessness at the expense of the public will not make litigation a better means of obtaining justice, improve the individual members of society, or aid the government in protecting law-abiding citizens from the menace of reckless drivers.

It seems to me the judgment affirmed extends liability for damages beyond legal or just bounds. As I view the undisputed facts defendants did not violate any private or public duty. Plaintiff's injuries resulted solely from his own negligence. The judgment should be reversed and the action dismissed.

LETTON, J., concurs in this dissent.

ALONZO G. DEPUTY, APPELLEE, v. MARGARET DEPUTY,
APPELLANT.

FILED MARCH 27, 1923. No. 22310.

Divorce: DISMISSAL. In a proper case this court will dismiss divorce proceedings for want of equity.

APPEAL from the district court for Gage county:
LEONARD W. COLBY, JUDGE. *Reversed and dismissed.*

E. O. Kretsinger and Parsons & Mills, for appellant.

Safranck, Dutton & Massey, contra.

Heard before MORRISSEY, C. J., ALDRICH and GOOD, JJ.,
BEGLEY and BUTTON, District Judges.

ALDRICH, J.

This was a suit for a divorce brought by plaintiff charging extreme cruelty and wilful abandonment on the part of the defendant. The court found generally in favor of the plaintiff upon the issues joined and granted the divorce prayed for, allowing defendant \$300 alimony and \$50 attorney's fees. The plaintiff was a Civil War veteran, 76 years of age; he was feeble in health and unable to perform ordinary manual labor; he has no property or means of support except his pension of \$50 a month from the United States. The defendant was 73 years of age. The court found that she had \$200 in money out at interest and was living with her daughter and other children who were able and willing to contribute for her support. The defendant has appealed to this court asking that the judgment of the district court be reversed and the plaintiff's action dismissed.

The parties to this suit were married in Missouri in the year 1867, and to that union seven children were born, five of whom are living. They lived in the state of Missouri for about 23 years, in a precarious way. After leaving Missouri they lived in Iowa. They have sustained marriage relations for a period of more than 50 years and they had better travel together for the remainder of life's fitful fever.

Their married life has not on the whole been altogether unsuccessful, for they have five children who are in every sense of the word trustworthy citizens.

Whatever may be said as to the shortcomings of the plaintiff herein, he was patriotic, and in the hour of his country's need offered the one great sacrifice common to all patriots; so in that respect he was a model man. In common with all patriots and heroes he now receives the compensation of a pension which will support him and his wife during the remainder of the years of their life. These two old people have been married for more than a half century and the wife, according to her own

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testimony, is willing to live with him now. She has some rights which as a matter of equity and fair dealing should not be disregarded. To allow the divorce would defeat her of the benefit of a widow's pension in case he should be called first. In all fairness to both parties concerned, we conclude that this divorce suit should be dismissed for want of equity to sustain it.

The decree is therefore reversed and the suit dismissed.

REVERSED AND DISMISSED.

GILBERT NELSON, APPELLANT, v. C. S. RADCLIFFE ET AL.,
APPELLEES.

FILED MARCH 27, 1923. No. 22311.

Leases. It is the rule in Nebraska that a lease for a term of years is chattel or personal property. *Mulloy v. Kyle*, 26 Neb. 313, followed.

APPEAL from the district court for Cheyenne county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

William B. Ross and R. P. Kepler, for appellant.

Radcliffe & Hyde, contra.

Heard before MORRISSEY, C. J., ALDRICH and GOOD JJ.,
GLEY and BUTTON, District Judges.

ALDRICH, J.

This is an action in ejectment brought by plaintiff against defendants, with a claim for damages for alleged wrongful withholding of possession of a certain tract of school land in Cheyenne county. The case was tried in the court below upon an agreed statement of facts stipulated by the parties. Judgment was for defendants, and plaintiff appeals.

In 1899 the state of Nebraska issued to Mary Gilmer a school land lease covering section 36, township 16 north, range 52 west of the sixth P. M., Cheyenne county, Nebraska, for a period of 25 years. On or about April 8, 1920, Mary Gilmer, who was then owner of the lease, executed and delivered to the defendant bank her promissory note in the sum of \$1,791.66, which note was in the

form of a collateral note, and the school lease was delivered by her to the bank in accord with a statement to that effect in the collateral note which she signed. The note authorized the bank to sell the collateral school land lease upon certain conditions.

Having advertised the lease for sale, the bank sold the same to the defendant Radcliffe, who took possession of the land described. Prior to the commencement of this action, Mary Gilmer assigned the lease to plaintiff. The parties stipulated that she may be substituted as a party plaintiff in lieu of the plaintiff Gilbert Nelson.

Appellant contends: "The leasehold estate conveyed by the state of Nebraska to Mary Gilmer was and is real estate, and that all of the proceedings of the bank relative to the sale of the lease are void and convey no title whatever to the appellee Radcliff."

The only issue presented for our consideration is whether or not the school land lease involved in this action is real or personal property. After a careful examination of the facts and the law in this case we are of the opinion that this matter is governed by *Mulloy v. Kyle*, 26 Neb. 313. Also, upon further examination of the law, we find that this is the law of this state as appears in the case of *Hibbeler v. Gutheart*, 12 Neb. 526. We find in *Souffrain v. McDonald*, 27 Ind. 269, the same rule applies in Indiana as does in Nebraska. From these different citations it is clear that a lease for a term of years is chattel or personal property, and we cannot find any law in the state of Nebraska which changes this rule. We also find it to be the law that "An administrator may sell a lease of real estate for a term of twenty-five years, held by his intestate, as personal property, under a proper order from the county court, without obtaining a license therefor from the district court, as in case of the sale of real estate for the payment of debts." *Mulloy v. Kyle*, 26 Neb. 313. Thus, in the statement of fact and this brief discussion of the law as laid down in *Mulloy v. Kyle*, *supra*, we have,

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in short, stated the law of the case as well as the facts involved.

Having determined upon the law and the fact that it is personalty rather than realty, it is finally determined as a matter of law that the issues herein presented are for affirmance. All the issues herein contemplated have been entered into and the appellant does not show any inclination now to entitle herself to the return of this lease under the facts and close out the issues between the parties. The issues presented here are fully resolved as a matter of law the same as they were in *Mulloy v. Kyle, supra*, and in affirming the instant case we follow the law as laid down and discussed in that case.

AFFIRMED.

ELIZABETH SPENCE, ADMINISTRATRIX, APPELLANT, v. POLENSKI BROTHERS, SCHELLAK & COMPANY, APPELLEE.

FILED MARCH 27, 1923. No. 22298.

1. **Negligence:** LICENSEE. Where a pond is formed on the premises of an owner as the natural consequence of removing clay for the manufacture of brick, and where an employee of the owner, a boy 16 years of age, during the noon hour, without the direction of the master, either express or implied, but with his knowledge and consent, voluntarily goes swimming in the pond for his own pleasure, and not in furtherance of the master's business, and is drowned, such employee is a licensee, and the master owes no duty to him as long as no wanton or wilful injury is inflicted upon him by the master or his servants.
2. ———: PLEADING: SUFFICIENCY. Substance of petition set out in the opinion, and *held*, that demurrer of the defendant thereto on the ground that petition fails to state facts sufficient to constitute a cause of action was properly sustained.

APPEAL from the district court for Adams county:
LEWIS H. BLACKLEDGE. JUDGE. *Affirmed*.

James & Danly, for appellant.

Tibbets, Fuller & Tibbets, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN and DAY, JJ., RAPER, District Judge.

DAY, J.

This action was brought by the plaintiff in behalf of the next of kin of Raymond Spence, to recover damages for his death, alleged to have been caused by the negligence of the defendant. The trial court sustained a demurrer to the petition upon the ground that it failed to state a cause of action. Plaintiff elected to stand on the petition; whereupon the court entered a judgment dismissing the case. The plaintiff appeals.

The only question to be determined is whether the facts pleaded state a cause of action. We deem it unnecessary to set out the petition in full. In substance it charges that the defendant is a corporation engaged in the manufacture of tile and brick; that its plant is located about a mile from the business center of the city of Hastings, Nebraska, where it occupies between five and ten acres of ground; that in conducting its business it had made large excavations upon certain portions of its property for the purpose of using the clay and sand in the manufacture of its products; that during the rainy seasons the excavations thus made filled with water and became a dangerous menace to the employees working in and about the plant; that at one place surface water formed a pond which at the time and place in question was about 18 feet deep, and that, owing to the dark, reddish color of the water, it was impossible to judge of its depth; that the employees at the plant remained on the premises during the noon hour; that with the knowledge and consent of the defendant some of them were in the habit, during the noon hour, of wading and swimming in this pond; that on July 3, 1919, during the noon hour, Raymond Spence, a boy 16 years of age, who at the time was employed by the defendant at the plant, together with other employees, went swimming in the pond, and was drowned; that said Spence had been employed but a short time, and did not know the dangerous character of the pond, and on account of his youth did not realize or appreciate the danger; that the defendant knew that

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the pond was a dangerous place, and knew that its employees were in the habit of swimming therein, and yet defendant negligently and carelessly permitted the pond to be and remain on the premises, and negligently and carelessly failed to give any notice or warning of the danger to its employees, and especially to the said Raymond Spence. The petition also contained this language: "That the death of the said Raymond Spence was caused by the negligent, careless and wrongful acts of the said defendant while the said Raymond Spence was in his usual course of employment." Other facts were alleged showing that the action was properly brought in the name of the plaintiff.

Upon the argument it was conceded that it was the intention of the pleader to base his cause of action upon the doctrine of negligence known at common law, and not upon the principles of the workmen's compensation act. It was further admitted by counsel for plaintiff, with commendable candor, that it was no part of Raymond Spence's duties to go swimming in the pond; that he went there voluntarily for his own pleasure during the noon hour, and not in furtherance of the master's business. Construing the petition in the light of this frank admission, which we are at liberty to do as being in the nature of the pleader's construction of the petition, we are led to conclude that, notwithstanding some general allegations of the petition which would seem to indicate that the deceased came to his death while in the performance of some duty, it was not intended by the petition to base the cause of action on the theory that the master had failed to exercise reasonable care to provide his servant with a reasonably safe place to work.

It is a well-settled doctrine that, before the master can be held liable for an injury to his servant growing out of such relationship, it must appear that the servant was injured through the negligence of the master, and that at the time of the injury the servant was engaged in carrying out some part of the master's business, or

going to or from the master's service along avenues provided by the master. The rule, however, does not extend to a situation where the servant at the time of the injury was acting outside of the scope of his employment, for his own purpose, without the direction of the master, either express or implied. This principle has been recognized by this court in *Blackman v. Western Electric Co.*, 97 Neb. 710, wherein it was held: "Where an employee voluntarily goes outside of the scope of his employment without the permission or the knowledge of his employer, and operates a rip-saw by which he is injured, the employer is not chargeable with actionable negligence for failing to give warnings of danger or instructions to prevent injury."

Under the facts alleged in the petition, together with the admitted facts made at the argument, we conclude that the unfortunate death of the deceased did not occur while he was in the performance of any of the duties of his employment, that he was not acting in any sense under the direction of his employer, either express or implied. It would seem, therefore, that the well-recognized principle that it is the duty of the master to exercise reasonable care to provide his servant with a reasonably safe place to work has no application to the facts before us.

What duty then did the defendant owe to the deceased? It is urged by the plaintiff that, inasmuch as the defendant knew that its employees were in the habit during the noon hour of swimming in the pond, and knew that it was dangerous to do so, therefore it was the duty of the defendant to warn the employees, and especially the deceased, of the danger. We are hardly prepared to agree with this general statement when applied to the facts in this case. Under the facts here presented we are inclined to the view that at the time and place of the accident the deceased was a licensee. It is true that the employees were permitted to remain on the premises during the noon hour, and perhaps to

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roam about at pleasure, but such a privilege would hardly warrant the inference that they were invited to go swimming in the pond, even when coupled with the fact that the employer knew that the employees were in the habit of swimming in the pond. Mere knowledge or acquiescence on the part of the owner that persons are using his premises does not amount to an invitation so as to impose upon the owner the obligation which he owes to an invited guest. 20 R. C. L. 64, sec. 56.

The case here is not within the principle of *Brotherton v. Manhattan Beach Improvement Co.*, 48 Neb. 563. In that case the defendant was conducting an amusement park for hire, and a part of the amusement provided was a swimming place to which the public were invited. It was there held that it was a question for the jury whether it was negligence to fail to notify the guests of the depth of the water, or otherwise protect them from danger. Neither is the case one, where one falls into an unguarded excavation.

A case more nearly in point is *Shults v. Chicago, B. & Q. R. Co.*, 83 Neb. 272, wherein it was held: "Where one enters upon the premises of another with his consent, but without an invitation, and not in the discharge of any public or private duty, he is a bare licensee, and the occupier of the premises owes no duty to him as long as no wanton or wilful injury is inflicted upon him by the licensor or his servants." See *Chesley v. Rocheford & Gould*, 4 Neb. (Unof.) 768.

It is next urged that the maintenance of the pond upon the premises by the defendant under the facts alleged made it an attractive nuisance to children, and brings the case within the rule announced in the Turntable cases, and that a cause of action is properly stated, based upon that theory. We are of the view, however, that the doctrine frequently announced in the class of cases generally known as the "Turntable" cases does not apply to the facts in the case at bar. By the great weight of decisions, our own included, the doctrine announced

in the Turntable cases has never been carried to the extent of including a pond within its scope. In *Richards v. Connell*, 45 Neb. 467, the facts were that the boy, ten years old, yielding to the natural impulses of childhood, using a section of a wooden sidewalk as a raft, went upon a pond on defendant's premises, from which raft he fell and was drowned. It was held: "The owner of a vacant lot upon which is situated a pond of water or dangerous excavation is not required to fence it, or otherwise insure the safety of strangers, old or young, who may resort to said premises not by invitation, express or implied, but for the purpose of amusement or from motives of curiosity."

Among the many cases which are readily to be found where children have been drowned in ponds, in which the courts have held there was no liability on the part of the owner, are the following: *City of Omaha v. Bowman*, 52 Neb. 293; *Peters v. Bowman*, 115 Cal. 345; *Stendal v. Boyd*, 73 Minn. 53; *Klix v. Nieman*, 68 Wis. 271; *Moran v. Pullman Palace Car Co.*, 134 Mo. 641; *Blough v. Chicago G. W. R. Co.*, 189 Ia. 1256.

We have not overlooked the case of *Tucker v. Draper*, 62 Neb. 66, wherein a recovery against the owner of premises was sustained for negligently causing the death of a child, three years and three months old, based upon the charge that the owner had negligently maintained upon the premises an unguarded well. The judgment was sustained upon the theory that the public generally, including the child, had been invited to use the premises, and also upon the theory that the well was in the nature of a dangerous trap, owing to the tender age of the child, and the peculiar circumstances surrounding the accident. The principle applied in that case has no application to the facts in the case at bar.

Upon a consideration of the facts alleged in the petition, we conclude that the petition fails to state a cause of action, and that the trial court was right in dismissing the case.

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The judgment is therefore

AFFIRMED.

JOE DAVEY, APPELLEE, v. PAUL AEVERMANN ET AL.,
APPELLANTS.

FILED MARCH 27, 1923. No. 22893.

1. **Appeal:** REVIEW. This court will not review an alleged ruling of the district court where the record brought to this court fails to disclose that such ruling was, in fact, made by the trial court.
2. **New Trial:** JOINT MOTION. Where two or more defendants file a joint motion for a new trial, any assignment of error therein that is not good as to all will not be considered as to any of such defendants.
3. **Bills and Notes:** TRIAL: QUESTIONS FOR JURY. Evidence examined, and held sufficient to require the submission to the jury of the defense of failure of consideration and the question of whether plaintiff was an innocent holder for value without notice.

APPEAL from the district court for Dixon county:
GUY T. GRAVES, JUDGE. *Reversed.*

D. Van Donselaar and C. H. Hendrickson, for appellants.

J. J. McCarthy, contra.

Heard before MORRISSEY, C. J., ALDRICH and GOOD, JJ.,
REGLEY and BUTTON, District Judges.

GOOD, J.

Action on negotiable promissory note by the holder against the makers thereof. Plaintiff had the verdict and judgment thereon and defendants have appealed.

Paul Aeevermann, Herman Aeevermann and Mrs. William Aeevermann were the makers and Lou Conway the payee of the note. Plaintiff purchased the note from the payee. The petition was in the usual form. A joint answer of all the defendants alleged that the note was procured by fraud, misrepresentation and duress, but failed to allege any facts that would constitute fraud or duress as to any of the defendants except Mrs. William Aeevermann. Failure of consideration was also alleged

The reply was a general denial. At the close of all the evidence, on plaintiff's motion, a verdict was directed in his favor.

1. Defendants complain that the court abused its discretion in denying them leave to file amended and substitute answers. The record fails to show any ruling of the court upon this question, and further fails to show that any request was made for leave to file any amended or substitute answers. This court will not review an alleged ruling of the district court where the record brought to this court fails to disclose that the ruling complained of was, in fact, made by the trial court.

2. Complaint is made because the trial court excluded evidence tending to establish fraud in procuring the signature of Mrs. William Aeevermann to the note. If any error was committed in this respect, it was not prejudicial to any of the defendants other than Mrs. William Aeevermann, because no facts constituting fraud were alleged, and the evidence offered did not tend to establish any fraud as to them; nor can the error, if any, be considered in this court as to Mrs. William Aeevermann, because she did not file a separate motion for a new trial. All of the defendants joined in one motion for a new trial, and, under the rule established in this jurisdiction, if error assigned in the motion for a new trial is not good as to all, it is not good as to any of the joint movers. *Hoke v. Halverstadt*, 22 Neb. 421; *Long & Smith v. Clapp*, 15 Neb. 417; *Dorsey v. McGee*, 30 Neb. 657; *McDonald v. Bowman*, 40 Neb. 269; *Harvey v. Harvey*, 75 Neb. 557.

3. Complaint is made because the court took the case from the jury and directed a verdict for the plaintiff upon his motion. Where the verdict of a jury is directed in a law action, the parties against whom the verdict goes are entitled to have the most favorable construction put upon the evidence received and offered by them. It becomes necessary, therefore, to examine the record in this case to see whether there was sufficient evidence tending

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to show that plaintiff was not an innocent holder for value in due course, and whether there was sufficient evidence, received and offered, tending to establish the defense of failure of consideration. There was evidence tending to show that plaintiff did not purchase the note until after the time claimed by him, and that within a day or two of the maturity of the note plaintiff sought to collect the note from the defendant Paul Aeevermann for the payee, and threatened said defendant, if he did not pay it, that he, plaintiff, would purchase the note and enforce its payment, and that at that time he was notified by said defendant that he would not pay the note until he had received a deed in a land transaction, for which the note was given. If plaintiff had not purchased the note at that time, this information was sufficient to put him upon inquiry as to the consideration for the note and any defense thereto that might have existed. There were other circumstances, either proved or offered to be proved, which have a bearing upon the good faith of the plaintiff in the purchase of the note.

From an examination of the record, we conclude that there was sufficient evidence, tending to impeach the good faith of the plaintiff in the purchase of the note, to require the submission of that question to the jury, if there was substantial evidence, received or offered, in support of the defense alleged. There was evidence offered and excluded which tended to establish a failure of consideration for the note. Under the circumstances, this was error, and the trial court should have received this evidence and should have submitted to the jury the question of failure of consideration. Under this state of the record, the court was not justified in taking the case from the jury and directing a verdict in favor of the plaintiff.

The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

Dysart v. Yeiser.

J. T. DYSART ET AL., APPELLEES, v. JOHN O. YEISER,
APPELLANT.

FILED MARCH 27, 1923. NO. 23176.

1. **Master and Servant: WORKMEN'S COMPENSATION CASES: ATTORNEY'S FEES.** Section 3031, Comp. St. 1922, construed, and *held* to limit the amount an attorney may lawfully charge or contract for as compensation for legal services or disbursements, in demands or suits arising under the workmen's compensation act, to such sum as may be approved in writing by the district judge.
2. ———: ———: ———. An attorney cannot enforce against a claimant for compensation any claim or agreement for attorney's fees, in a demand or suit brought under the provisions of the workmen's compensation act, for an amount in excess of that which is approved by the district judge.
3. ———: ———: ———: **CONSTITUTIONAL LAW.** Section 3031, Comp. St. 1922, restricting the amount an attorney may charge for legal services, in cases arising under the workmen's compensation act, to such sum as the district judge shall approve, is a proper exercise of the police power of the state and does not contravene the provisions of either the fifth or the fourteenth amendment to the federal Constitution.
4. **District Courts: POWERS: SUSPENSION OF ATTORNEY.** District courts are vested with jurisdiction to suspend attorneys from practice : their judicial districts upon proper showing.

APPEAL from the district court for Douglas county:
CHARLES LESLIE, JUDGE. *Affirmed as modified.*

John O. Yeiser, pro se.

Henry J. Beall and John W. Yeager, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH, DEAN,
DAY and GOOD, J.J., RAPER, District Judge.

GOOD, J.

This case is brought to this court to review an order of the district court for Douglas county, directing appellant to refund \$620 to his client, Anna Burkman, within 60 days, and, on failure so to do, that he stand suspended from the right to practice as attorney at law in said county until the further order of the court.

In October, 1919, a son of Anna Burkman, while in the

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employ of the Blue Taxicab Company of Omaha, and while in the performance of his duties as a driver, had a collision with a street car of the Omaha & Council Bluffs Street Railway Company, resulting in his death. Mrs. Burkman employed appellant to represent her, to recover from the Blue Taxicab Company under the workmen's compensation act. A Mrs. Mortenson was appointed administratrix of the estate of the deceased son of Mrs. Burkman, and Mr. Yeiser was employed by the administratrix to prosecute an action against the Omaha & Council Bluffs Street Railway Company for damages because of its alleged negligence in bringing about the collision, which resulted in the death of young Burkman.

Appellant contends that he made a contract with Mrs. Burkman and with Mrs. Mortenson, by the terms of which he was to prosecute both cases and receive as compensation 40 per cent. of the amount recovered. Mrs. Burkman insists that the agreement was that Mr. Yeiser should have such fee in the compensation case as the court might allow, and that he was to have a contingent fee of 40 per cent. of the recovery in the action against the street railway company. The committee appointed by the court to investigate and make report of the complaint found that the contract between the parties provided that the compensation case against the taxicab company should be prosecuted by Mr. Yeiser for such fee as the court would allow him, and the action against the street railway company on the basis of 40 per cent. of the amount recovered, and found that the compensation case was settled for a total lump sum of \$3,974, and that the court allowed him, as attorney's fee in that case, the sum of \$250; that Mr. Yeiser retained out of the \$3,974 the sum of \$870, or \$620 in excess of the court's allowance.

The record shows that the action against the street railway company is still pending in the district court on a motion for a new trial, and that a settlement was made in the compensation case in July, 1921, whereby compensation was allowed to the extent of \$3,974. Mr.

Yeiser settled with Mrs. Burkman and paid her the avails of the compensation case, less \$870, which he still retains, and asserts the right to retain, under the contract he claims to have made with Mrs. Burkman for compensation.

Appellant assigns as error that there is not sufficient evidence to support the finding and order; that the order is contrary to law; and that the court has no jurisdiction to enter such an order.

The view we take of the questions presented for determination makes it unnecessary to determine whether the contract of employment in the compensation case was for the percentage of the recovery, as claimed by appellant, or for such fees as the district court would allow, as claimed by Mrs. Burkman.

1, 2. Section 3031, Comp. St. 1922, being a part of the workmen's compensation act, provides: "No claim or agreement for legal services or disbursements in support of any demand made or suit brought under the provisions of this article shall be an enforceable lien against the amounts to be paid as damages or compensation or be valid or binding in any other respect, unless the same be approved in writing by the judge presiding at the trial, or, in case of settlement without trial, by the judge of the district court of the district in which such issue arose. After such approval, if notice in writing be given the defendant of such claim or agreement for legal services and disbursements, the same shall be a lien against any amount thereafter to be paid as damages or compensation: *Provided*, however, where the employee's compensation is payable by the employer in periodical instalments, the court shall fix, at the time of approval, the proportion of each instalment to be paid on account of legal services and disbursements."

Appellant insists that this section of the statute, if properly construed, relates to attorney's liens, and does not place any restriction upon the right of attorneys to contract for compensation in such cases, and, if it is

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construed to affect the right to contract for compensation, that it would be unconstitutional, as interfering with the right to contract.

A careful examination of the statute quoted shows that it relates to claims or agreements for legal services and disbursements, as well as to liens for attorney's fees, in actions or claims arising under the workmen's compensation act. By omitting the parts of the first sentence of the statute which relate to attorney's lien, the section would read: "No claim or agreement for legal services or disbursements in support of any demand made or suit brought under the provisions of this article shall be an enforceable lien * * * or be valid or binding in any other respect, unless the same be approved in writing by the judge presiding at the trial, or, in case of settlement without trial, by the judge of the district court of the district in which such issue arose. It seems too plain to admit of argument that the legislature intended to restrict and limit the amount an attorney could lawfully charge or contract for as compensation for legal services or disbursements, in demands or suits arising under the workmen's compensation act, to such fee or sum as should be approved in writing by the district judge. It necessarily follows that an attorney cannot enforce against a claimant for compensation any claim or agreement for attorney's fees, in a suit or demand brought under the provisions of the compensation act for an amount in excess of that which is approved by the district judge.

3. Appellant argues that the statute, if construed to regulate or restrict the right to contract between attorney and client for fees for legal services, is in violation of the provisions of the federal Constitution which guarantee "rights in property," due process of law, and equal protection of the law. These constitutional provisions are intended to, and do, guarantee the right to make and enforce contracts as property rights, but the right to make and enforce contracts may be restricted

and is subject to such limitations as the state, in the proper exercise of its police power, may impose. That is to say, it is subject to reasonable restraint and regulation in the interest of the public welfare. Laws regulating the rate of interest, commonly called usury laws; federal statute fixing the amount that may be charged for attorney's fees in pension claims; limiting the charges of railroads for carrying passengers or freight; limitation upon the employment of women and children as to the hours of service and limitation upon the hours of service of adults in certain hazardous occupations; limitations upon the right to sell intoxicating liquors, explosives, firearms, poisons and deleterious drugs, and many others might be mentioned as an exercise of this power. Even in the workmen's compensation act under consideration, the law requires the compensation to be paid in periodical sums, and not in lump sum, except when authorized by the court. The question is as to whether the regulation is reasonable and is in the interest of the public welfare. If so, it does not conflict with the constitutional provisions. It is a matter of general knowledge that a large percentage of the persons who come under the workmen's compensation act are not possessed of large means, but are dependent upon their earnings for the support of themselves and families. If the earning power of the bread-winner is destroyed or greatly impaired by an injury, he must look to the compensation provided by the statute for the support of himself and family, and, if this compensation may be depleted by an improvident or unreasonable contract for legal services, he and his dependents are likely to become public charges. It is in their interest, and the interest of the public as well, that they should be protected from contracts or charges for attorney's fees that are not reasonable. The statute does not fix an arbitrary charge, but leaves the amount to be determined and fixed by the judge. It will not be presumed that the judge will refuse to make a reasonable

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allowance or to approve a fair and just charge.

We hold that the statute is a proper exercise of the police power of the state, and is not repugnant to the provisions of the federal Constitution, guaranteeing rights in property, due process of law, and equal protection of the law.

4. Appellant contends that the district court is without jurisdiction to suspend an attorney from the practice of his profession. The precise question has been heretofore determined in this court, where it was held that the district court was vested with power to suspend an attorney from practice in that court, but that such order should be limited to suspension from practicing in the judicial district. *In re Disbarment Proceedings of Newby*, 76 Neb. 482.

It is but fair to appellant to say that he in good faith believed that said section 3031, when properly construed, did not limit the amount an attorney could lawfully charge or contract for as compensation for legal services or disbursements, as against a claimant for compensation in demands or suits arising under the workmen's compensation act, and his appeal to this court was largely for the purpose of having an interpretation of said section by the court of last resort.

While there is no error in the record, we think the order should be modified so as to permit appellant to comply with the order of the court within 20 days from the issuance of the mandate of this court before the sentence of suspension shall be effective.

As modified, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

WILLIAM KRULL, EXECUTOR, APPELLEE, v. CHARLES H. ARMAN, APPELLANT.

FILED MARCH 27, 1923. No. 22305.

1. **Executors and Administrators:** ACTION FOR DEBT: BURDEN OF PROOF. In an action by an executor to recover money alleged to have been loaned by plaintiff's testator to defendant, where de-

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fendant has answered by a general denial, the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that the defendant received the money from the testator as a loan, and not as a gift.

2. **Gifts: BURDEN OF PROOF.** "The general rule that the burden of proof is on the one having the affirmative of an issue applies to actions in respect to gifts." 28 C. J. 669, sec. 71.
3. ———: **INSTRUCTION.** In such case, where the plaintiff calls the defendant as a witness, and defendant admits the receipt of the money and that testator was not indebted to him, and further testifies that plaintiff's testator gave him the fund, it is error for the court to instruct the jury, as a matter of law, that the receipt of the money by defendant would be presumed to be a loan, and not a gift.

APPEAL from the district court for Lancaster county:
WILLIAM M. MORNING, JUDGE. *Reversed.*

R. J. Greene and Hugh C. Wilson, for appellant.

Charles E. Matson and Clarence G. Miles, contra.

Heard before MORRISSEY, C. J., ALDRICH, DAY and GOOD, JJ., RAPER and TROUP, District Judges.

RAPER, District Judge.

Action by William Krull as executor of the last will of Samuel S. Griffin, deceased, to recover money alleged to have been loaned by Samuel S. Griffin to defendant. The answer is a general denial, and a denial that defendant is indebted to plaintiff upon the cause of action. During the trial the plaintiff called the defendant, who was son-in-law of deceased, as a witness and proved that Mr. Griffin had given defendant a check for \$8,085.14, in March, 1918. Defendant testified that Mr. Griffin owed him \$2,085.15 on some grain and other transactions, and that defendant did not owe anything to Mr. Griffin. He further testified, both on direct and cross-examination, that the \$6,000 was a gift from Mr. Griffin to him and his family to put into a home for the family, so they would not move away, but would remain in the vicinity. There was much other evidence tending to support and refute the claim that the money was a gift, but there is no claim or evidence that

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deceased was subjected to any undue influence. The trial court gave an instruction (No. 2) in substance as follows: That since it is admitted by the defendant that the said sum of \$6,000, turned over to him at said time (March, 1918) by said deceased, was not in payment of an obligation or debt due or existing against the deceased, and in favor of the defendant, the law presumes that it was a loan of so much money to the defendant, unless he satisfied you by a preponderance of the evidence that it was a gift from the deceased to him and his family, and, unless the defendant has satisfied the jury by a preponderance of the evidence that said transaction was a gift of said money to the defendant and his family, the plaintiff is entitled to recover that sum with interest at 7 per cent. from the time the defendant received the money. The jury returned verdict for plaintiff, upon which judgment was rendered; the defendant appeals.

The appellant alleges that the court erred in giving instruction No. 2, which places the burden of proof on the defendant. The petition alleged a loan. The answer was a general denial. Generally, under an issue thus formed, the burden does not shift, but remains on the plaintiff throughout the trial, and this seems to be the rule where the defendant, as in this case, claims that the money or property sued for is a gift. *Payne v. Williams*, 62 Colo. 86; *Marra v. Bigelow*, 180 Mass. 48; *Jenning v. Rohde*, 99 Minn. 335; *Leask v. Hoagland*, 205 N. Y. 171; 28 C. J., 669, sec. 71.

Another vice claimed in the instructions is that it tells the jury that the receipt of the money by defendant, when shown not to be in payment of a debt owing by deceased to defendant, raises the presumption that it was a loan. Courts have in some cases laid down the rule as stated in the instruction, others have given a contrary holding. A study of these cases shows that, in most of those holding that burden is on the donee to prove the gift where he is defending his right thereto, there were special circumstances which gave rise to a situation that required such

rule, as where the donor retained possession of the property or the donee had access to the property or fund before the date of the alleged gift, or where there existed a fiduciary relation between donor and donee, or where there is evidence of or opportunity for undue influence, or some mental or physical weakness or infirmity which might be sufficient to cast doubt upon the donor's intelligent and free action in making the gift. In the absence of some of these special features, the general rule in an action to recover the property is that the burden is not on the recipient of money to prove it was a gift and not a loan. *Sterry v. Fitz-Gerald*, 95 N. J. Law, 51; 28 C. J. 669, sec. 71; *Lynch v. Lyons*, 115 N. Y. Supp. 227. However, without attempting to give a general rule as to presumptions in such cases, the facts as developed on the trial were such that the court should not have instructed as a matter of law that by the defendant's receipt of the money the transaction was presumed to be a loan and not a gift. *First Nat. Bank v. Adams*, 82 Neb. 801.

At the close of the testimony the appellant asked for a peremptory instruction on the claim that, because plaintiff called the defendant as a witness, and elicited testimony from him that deceased gave him the money, plaintiff is absolutely bound by his answers, and is estopped from setting up that they are either untrue or that the witness is not credible. Appellant cites *Nathan v. Sands*, 52 Neb. 660. This case states the correct rule, and evidence tending only to impeach such witness is not admissible. Contradiction, however, and impeachment are not synonymous. The distinction is pointed out in *De Noyelles v. Delaware Ins. Co.*, 138 N. Y. Supp. 855, quoted in 2 Words and Phrases, Second Series, under "Impeachment:" "A party may contradict his own witness, for contradiction is not impeachment, as impeaching evidence is that which is directed solely to the question of the credibility of the witness." See, also, 40 Cyc. 2561; *Dravo v. Fabel*, 132 U. S. 487; *Thorpe v. Leibrecht*, 56 N. J. Eq. 499. In this last case Mr. Justice Pitney an-

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nounces what appears to be a fair and comprehensive rule, as follows: "While a plaintiff who calls defendants as his witnesses cannot impeach their character for veracity generally, he may show that the whole or any part of what they had sworn to is untrue either by their own examination and the improbability of their own story or by other contradictory evidence material to the case." As stated in *Dravo v. Fabel, supra*: "The evidence must be given such weight as under all the circumstances it is fairly entitled to receive." While we refrain from expressing any opinion as to the sufficiency of the evidence, the defendant on that theory alone was not entitled to have the court assume as a matter of law that defendant's evidence could not be contradicted or overcome.

The giving of instruction No. 2 was prejudicially erroneous, and the judgment is reversed and the cause remanded for new trial.

REVERSED.

CHARLES C. COOPER ET AL., APPELLEES, v. H. R. BANE ET AL., APPELLANTS

FILED MARCH 27, 1923. NO. 22231.

1. **Contracts:** EVIDENCE: PARTY IN INTEREST. A contract for the benefit of a third person may be enforced by him, although it is not made in his name and the consideration does not move from him; in other words, the real party in interest may identify his interest in the contract and enforce the same accordingly, and the facts relating thereto may be proved by parol evidence.
2. **Guaranty:** CONSTRUCTION. The stipulation in the contract that "any change or status by second party or notes representing bills receivable held by said Dunning State Bank at the time of the transfer of said stock to second party (except by payment on principal) shall relieve first parties from responsibility on note or notes so changed," construed, and *held*, while the language of the clause is somewhat obscure, the context on the whole indicates that the "change" contemplated therein is in the status of the notes, and not in the status of the person or persons handling the notes.
3. **Evidence:** SUFFICIENCY. The several issues of fact arising in the case submitted to the jury under proper instructions, evidence examined, and *held*, same supports the verdict.

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APPEAL from the district court for Blaine county:
BAYARD H. PAINE, JUDGE. *Affirmed.*

Sullivan, Squires & Johnson and Hainer & Flansburg,
for appellants.

Burkett, Wilson, Brown & Wilson, contra.

Heard before MORRISSEY, C. J., GOOD, DAY and ALDRICH,
J.J., RAPER and TROUP, District Judges.

TROUP, District Judge.

This case arises out of the consolidation of two banks at Dunning, Nebraska. The owners of the selling bank guaranteed its assets, and this suit is upon that guaranty. From a judgment against the guarantors, this appeal is taken.

The petition of the plaintiff, in substance, alleges that on June 1, 1918, the plaintiff entered into a contract with the defendants for the purchase of 100 shares of the capital stock of the Dunning State Bank, of Dunning, Nebraska, which said 100 shares comprises all of the stock issued and outstanding at that time. The contract is in writing and set forth in full in the petition, but we insert only such part thereof as we think needful to a proper consideration of the issues, as follows:

"Second. First parties represent all books, records and accounts of the said Dunning State Bank to be true and correct and agree to adjust any errors that may be found to have existed at the time of the transfer of the above stock to second party. First parties further represent all notes representing bills receivable held by said Dunning State Bank at the time of the transfer to second party of the within stock to be true in amount, genuine as to signature of maker, and guarantee the payment of said notes in the same proportion as the number of shares of stock herein sold bears to the entire capital stock, namely, 100 per cent. It is mutually understood and agreed that second party shall use due diligence in the handling and collection of said bills receivable and the said second party shall have fifteen days after maturity

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of any note or notes representing bills receivable held by the Dunning State Bank at the time of the transfer of said stock to the second party in which to make collection of any note or notes representing such bills receivable, failing to collect the same within fifteen days after maturity and not wishing to extend or renew such note or notes the second party shall give notice in writing to first parties of his inability to collect such note or notes and first parties shall have thirty days from date of such notice in which to make such note or notes acceptable to second party, failing so to do first parties shall pay to second party in cash the full amount of such note or notes together with accrued interest thereon, and by so doing first parties shall acquire an interest in such note or notes equal to the amount so paid by them."

It was further stipulated in the contract that the notice to defendants of nonpayment of any notes covered by said guaranty, as above provided, shall be sufficient if mailed to A. C. Blanchard at Merriam, Nebraska, and that the contract shall be binding upon the heirs and assigns of all parties thereto.

The petition further alleges that the purchase price of said stock was paid in full, and the same, together with the assets of said bank, including the notes in suit, were delivered to plaintiff; that thereafter the things required by said contract to be kept and performed by the plaintiff were, in all respects, kept and performed; that thereafter the notes in suit, being among those guaranteed by defendants, became due and payable, and, the same remaining unpaid, the defendants were duly notified of the default and payment demanded and same refused by defendants, and prayer for judgment follows.

It appears that about 15 months after plaintiff commenced this suit he sold all his interest in the Home State Bank at Dunning, of which he was president and owning 90 per cent. of its stock, including all interest in the present suit, and removed permanently to the state of California. Thereupon the said Home State Bank

filed herein its petition of intervention, wherein it alleges that at all times it was and is the real party in interest in the purchase of the Dunning State Bank stock from defendants, as defendants well knew and understood at the time of entering into the transaction, and that it was agreed by all concerned that the contract therefor should be entered into by said Charles C. Cooper for and on behalf of the intervener herein, Home State Bank, said Cooper being then the president and largest stockholder therein, and that the purpose of said contract was that the assets of said Dunning State Bank were to become the property of said Home State Bank; that immediately upon the completion of the transaction the property of the Dunning State Bank became the property of the Home State Bank, the latter assuming the liabilities of the former, whereupon the former surrendered its charter to the state and became defunct, all of which was well understood and agreed to by defendants; that since said transfer certain notes included within said purchase, aggregating the sum of \$5,330.53, became due and payable and remained unpaid; that notwithstanding plaintiff and intervener have kept and performed all things required of them under said contract to be kept and performed, and given defendants due notice of the nonpayment of said notes, defendants have failed and refused to pay the same, wherefore the intervener prays judgment.

The defendants, in their joint answer to the petition of intervener, admit the contract in question, but deny that Cooper entered into the same for and on behalf of the intervener; that they transferred said stock to Cooper, and not to intervener, and relied upon him personally because of their knowledge of him as a careful, energetic business man of long experience in the collection of commercial paper; they deny that either plaintiff or intervener used due diligence in any instance to collect the said notes, and deny all other allegations in said petition not otherwise admitted.

From the large volume of evidence taken and the

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apparently formidable briefs filed, one's first impression is that the record probably presents some very difficult and intricate problems for solution, whereas, in fact, the questions involved are simple and easily determined.

The first complaint of the 16 assigned is that the court erred in overruling defendants' motion to strike the petition of intervention on the ground that it never had a legal standing in this action. Section 8552, Comp. St. 1922, settles this point against the defendants. See, in connection therewith, *State v. Farmers State Bank*, 103 Neb. 194, and *McConniff v. Van Dusen*, 57 Neb. 49.

The great burden of the defense seems to be that the contract between the contesting parties is that it was one so strictly personal to the plaintiff Cooper, as vendee, that the defendants have a right to demand that the duties to be performed by the vendee under the contract shall be performed by him and him only, and that any other than the plaintiff undertaking to perform the duties required, however faithfully said duties may have been performed in fact, will exonerate the defendants from all obligation to perform their part of the contract; a somewhat anomalous position to take, it would seem, in view of the very significant provision of the contract itself permitting assignment, as well as all the facts and circumstances surrounding the transaction as shown by the evidence. Counsel for plaintiff and intervener suggests that this defense is the result of an afterthought, and not an idea present in the minds of defendants at the formation of the contract, and as we read the evidence and view the whole situation we are strongly inclined to the same opinion. If, however, it appears, as a matter of fact, that the defendants did not contract with Cooper with a view of securing his personal attention to the collection and handling of said notes, and if it further appears, without serious dispute, that the person or persons who did handle them were as well or better qualified to do so successfully than Cooper could possibly be under the circumstances, then there is nothing left to

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defendants' theory upon this point. One may be expected naturally to wonder to what appreciable extent the personal equation likely figured in the minds of defendants, when they knew³ the contract into which they were entering, and did enter, contained an express provision that the "same shall be binding upon the heirs and assigns of all parties hereto," and that the person with whom they contracted might undertake at least to assign said contract within 24 hours after its execution. This expression of wonder is all the more warranted from the incident shown by the evidence that as a matter of fact a like contract between defendants and another had been assigned to Cooper just prior to the execution of the present agreement. However this may be, we think the evidence clearly shows that defendants had no thought of reliance upon the personal knowledge of the subject-matter of the transaction by Cooper or his general acquaintance with the makers of the notes or the patrons of the bank when they were seeking a purchaser for their bank stock, for it is in evidence that very shortly before the execution of the present contract defendants sold 80 per cent. of the identical bank stock finally going to Cooper, through a brokerage house in Omaha, to a man in Council Bluffs, Iowa, whom they never saw nor heard of before, and whom they have never seen yet, so far as the evidence discloses, and entered into a contract with him identical with the present contract, so the evidence seems to show, except as the number of shares of stock. It was through an assignment of that contract by the Council Bluffs man to Cooper that the latter came to deal with defendants and make the contract in question. So it would seem defendants could not have had in mind, in the first instance at least, the selection of a purchaser upon whom, because of his acquaintance in the community and with the patrons of the bank, they relied personally to handle the bank's commercial paper, including the notes in suit. Besides, defendants knew that Cooper himself did not live at Dunning, and never did: he lived at

University Place, a suburb of Lincoln, Nebraska, and his bank at Dunning, the Home State Bank, the intervener herein, was handled by others and by the same persons who handled the notes in suit in their efforts to collect same from the makers, to which persons and bank the purchased assets of the Dunning State Bank were turned over. Again, when the first of the guaranteed notes became due and unpaid, defendant Blanchard, who by appointment represented all defendants, was notified by the intervener of the defaulted note and the same was promptly paid by defendants to the Home State Bank. So, likewise, with one or more other notes, until at one time defendants refused payment because, as Blanchard said, "thirty days not up;" and again, for a like reason, and still again, and finally, because the guarantors had no funds with which to pay, all the while corresponding and dealing with the Home State Bank and receiving letters written by the Home State Bank officials upon the Home State Bank printed stationery, and at no time until the answer was filed in this suit did defendants intimate that they relied upon Cooper personally to handle and collect the purchased assets of their bank. But, still further, the question of whether the contract in suit was the personal one of Cooper and was made by him for and on behalf of Home State Bank, with full knowledge of that fact by the defendants at the time, was submitted to the jury and by their verdict they found the latter to be the fact. This we think is equivalent to finding that defendants did not intend or expect that Cooper should be obliged to give his personal attention to the handling or collecting of the notes in question.

The question last above stated would then be the next in order to be disposed of, and we have just said that question was submitted to the jury, and that by their verdict the jury found that the contract in question was not the personal contract of Cooper, but that it was made for and on behalf of Home State Bank, the intervener herein, with full knowledge on the part of defendants at

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the time it was being so made. We cannot take either the time or space to specifically point out all of the testimony in support of said finding; but, as an example of the evidence in that regard, it may be said that, not only is there direct evidence that Cooper told defendants, at the time, that the contract was made in behalf of his own bank, but that they well knew and understood that such was the only practical purpose and reason he had in making the purchase he did, namely, to close out the defendants' bank and consolidate the same with his own. Defendants knew that Cooper was the president of the Home State Bank; they surely did not suppose that he was buying their bank to continue it as a rival to his own. The finding of the jury on this point is amply supported by the evidence.

It might not be out of place here to remark, as was said in substance in the somewhat similar case of *Everson v. Gere*, 122 N. Y. 290, that if the intervener for whose benefit the contract was made fully complied with the obligations imposed upon it by the contract, the defendants having undertaken to pay the notes if the makers did not, it could make no difference to them whether they paid to Cooper or to some other person entitled to receive the same.

The next question naturally in order is: Did the Home State Bank, in whose charge the collection of the notes in suit in the first instance rested, through its officers and employees, fairly and fully perform the duties required of it by the contract? This question was also submitted to the jury for its determination and by its verdict it found that it had. We think this finding is sufficiently supported by the evidence.

Another assignment is that, the contract having been executed by Charles C. Cooper, the court erred in admitting oral testimony to show that it was in fact made for and on behalf of the Home State Bank. The rule is elementary that a contract for the benefit of a third person may be enforced by him, although it is not made in his

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name and the consideration does not move from him. In other words, the real party in interest may identify his interest in the contract and enforce the same accordingly, and the facts showing him to be such may be proved by parol evidence. The cases declaring this doctrine are, of course, entirely too numerous to mention, but many of them may be found cited under 22 C. J. 1235, sec. 1648, and Mechem on Agency, sec. 769. Such evidence does not contradict the writing; "it only explains the transaction." *Ford v. Williams*, 62 U. S. 287. The following are some of the cases in our own state in which the general rule is announced: *Shamp v. Meyer*, 20 Neb. 223; *Norman v. Waite*, 30 Neb. 302; *Barnett v. Pratt*, 37 Neb. 349; *Doll v. Crume*, 41 Neb. 655; *Forburger Stone Co. v. Lion Bonding & Surety Co.*, 103 Neb. 202. In connection herewith see *Punta Gorda Bank v. State Bank*, 52 Fla. 399.

The defendants complain of the judgment rendered in the case, and claim it was entered without lawful authority and therefore void. We have carefully examined the grounds for this complaint, as disclosed by the transcript, and are satisfied that no error was committed by the court and no prejudice accrued to defendants by the manner in which the judgment was finally adjusted and entered.

The claim that defendants should be relieved from liability on the notes under the clause of the contract which provides that "any change or status by second party or notes representing bills receivable held by said Dunning State Bank at the time of the transfer of said stock to second party (except by payment on principal) shall relieve first parties from responsibility on note or notes so changed," because the notes were handled by the Home State Bank, the real party in interest, instead of by Cooper personally, is, we think, not well founded. While the language of this clause is somewhat obscure, we think that the "change" contemplated therein is in the status of the notes, and not the status of the person or persons

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handling the notes. The whole context, we think, indicates this. There is no evidence showing that the status of any of the notes which defendants were called upon to pay was changed in any respect from the time plaintiff received them until defendants were called upon to pay them.

Complaint is made to the giving or refusing of many instructions, but upon examination of the same we find that virtually all have been disposed of by the decision of the main issues and therefore no separate review thereof is required.

Finding no reversible error, the judgment of the district court is

AFFIRMED.

The following opinion on motion for rehearing was filed November 16, 1923. *Former judgment of affirmance vacated, and judgment of district court reversed.*

1. **Banks and Banking: CONTROL.** The affairs and business of a Nebraska banking corporation are under the control of a board of directors. Comp. St. 1922, sec. 8007.
2. ———: **PURCHASE OF STOCK.** Except "to prevent loss upon a debt previously contracted in good faith," a Nebraska banking corporation cannot purchase or hold the capital stock of another corporation, including that of a rival state bank. Comp. St. 1922, sec. 8006.
3. ———: **SALE OF STOCK: CONSOLIDATION.** A written agreement by officers of a state bank to sell its entire capital stock to the officers of a rival state bank does not necessarily imply a contract to consolidate the two banks, even where the sellers in their contract guarantee the assets transferred with the capital stock sold.
4. ———: ———: **GUARANTY OF ASSETS.** If an indivisible contract to sell all the capital stock of a Nebraska banking corporation to a rival state bank is invalid because executed in violation of statute, a guaranty of assets, inserted in the same contract as an incident of the sale, falls with the principal transaction.
5. ———: **CONSOLIDATION.** Two Nebraska banking corporations cannot consolidate without the consent of the department of trade and commerce. Comp. St. 1922, sec. 8021.

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6. ———: ———: EVIDENCE. Evidence outlined in opinion *held* insufficient to prove an agreement by officers of two state banks to consolidate them.
7. **Opinion Withdrawn.** Opinion and syllabus reported in *Cooper v. Bane ante*, p. 74, withdrawn upon a reargument.

Heard before ROSE, DEAN and GOOD, JJ., REDICK, District Judge.

PER CURIAM.

This is an action on a contract of which the following is a copy:

“Contract and Agreement.

“This contract and agreement made and entered into by and between A. C. Blanchard and A. H. Metzger of Cherry county, Nebraska, William Fleishmann of Sheridan county, Nebraska, and H. R. Bane of Blaine county, Nebraska, parties of the first part, and C. C. Cooper of Lancaster county, Nebraska, party of the second part, witnesseth: That the first parties have this day bargained and agreed to sell, assign and transfer to the party of the second part and the second party has agreed to purchase and pay for 100 shares of the capital stock of the Dunning State Bank of Dunning, Nebraska, subject to the following terms and conditions, all of which are made a part of the consideration of this contract.

“First. The agreed price is fifty (50) dollars per share above actual value on date of transfer (said actual value to be determined by adding capital, surplus, undivided profits, guaranty fund, interest, exchange and all other items of credit due to the said Dunning State Bank, deducting therefrom all interest due on certificates of deposit, unpaid bills of expense, taxes and other items of expense owing by said Dunning State Bank). Payment for said stock shall be made by second party in the following time and manner: Three thousand (3,000) dollars cash at the time of signing this contract, receipt of which is hereby acknowledged by the first parties, balance (exact amount to be determined as above provided) at the time of the

transfer of said bank stock to second party, which shall be on or before June 1, 1918.

"Second. First parties represent all books, records and accounts of the Dunning State Bank to be true and correct and agree to adjust any errors that may be found to have existed at the time of the transfer of the above stock to second party. First parties further represent all notes representing bills receivable held by the said Dunning State Bank at the time of the transfer to second party of the within stock to be true in amount, genuine as to signature of maker, and guarantee the payment of said notes in the same proportion as the number of shares of stock herein sold bears to the entire capital stock, namely 100 per cent. It is mutually understood and agreed that second party shall use due diligence in the handling and collection of said bills receivable and the said second party shall have fifteen days after maturity of any note or notes representing bills receivable held by the Dunning State Bank at the time of the transfer of said stock to the second party in which to make collection of any note or notes representing such bills receivable, failing to collect the same within fifteen days after maturity and not wishing to extend or renew such note or notes the second party shall give notice in writing to first parties of his inability to collect such note or notes and first parties shall have thirty days from date of such notice in which to make such note or notes acceptable to second party, failing so to do first parties shall pay to second party in cash the full amount of such note or notes together with accrued interest thereon, and by so doing first parties shall acquire an interest in such note or notes equal to the amount so paid by them. It is distinctly understood and agreed by both parties hereto that any change or status by second party or notes representing bills receivable held by said Dunning State Bank at the time of the transfer of said stock to second party (except by payment on principal) shall relieve first parties from responsibility on note or notes so changed.

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"Third. First parties agree to resign in favor of second party all insurance, farm loan and other agencies for outside lines of business conducted in connection with the Dunning State Bank.

"Fourth. First parties agree not again to engage in the banking business in the town of Dunning, Nebraska, for a period of five years from the date of this contract under penalty of five thousand dollars (\$5,000) liquidated damages to second party for violation of this paragraph of contract and agreement.

"Fifth. It is mutually understood and agreed that this contract shall be binding upon the heirs and assigns of all parties hereto.

"Sixth. Parties of the first part hereby agree that notice of nonpayment of any note or notes held as bills receivable by the said Dunning State Bank shall be sufficient if mailed to A. C. Blanchard at Merriman, Nebraska.

"Seventh. Parties to this agreement acknowledge the payment in full for amount due in the transfer of the stock of the said Dunning State Bank, Dunning, Nebraska, on this date.

"Made in duplicate, dated and signed at Dunning, Nebraska, this 1st day of June, 1918.

"(Signed) A. H. Metzger,

"A. C. Blanchard,

"W. Fleishmann,

"H. R. Bane,

Parties of the first part.

"C. C. Cooper,

Party of the second part.

"In Presence of P. Wilson."

Charles C. Cooper, named as party of the second part, commenced, as plaintiff, an action on this contract against defendants, H. R. Bane, A. C. Blanchard, A. H. Metzger and William Fleishmann, parties of the first part, February 17, 1919. Prior to June 1, 1918, Blanchard was president, Metzger vice-president, and Bane cashier

of the Dunning State Bank, a Nebraska banking corporation. In his petition Cooper pleaded that he performed the contract on his part and received from defendants pursuant thereto all the capital stock purchased by him from them, being the entire capital stock of the Dunning State Bank; that four of the notes which, under the contract, had been guaranteed by defendants had not been paid, the amount due thereon from them to him being \$7,760.23; that the failure of defendants to pay him the amount due on these notes was a breach of the contract. The relief demanded by plaintiff was judgment against defendants for the sum stated.

After defendants assailed the petition of plaintiff by demurrer and answer, the Home State Bank of Dunning, also a Nebraska corporation, intervened August 5, 1920, and filed a petition pleading for its own use and benefit the identical contract pleaded by Cooper, making it part of the petition in intervention. The defendants are the same in both instances. In the two petitions the same relief is demanded for breach of the same contract, except that intervener pleads the failure of defendants to pay three only of the notes described in plaintiff's petition, the amount alleged to be due intervener from defendants being \$5,336.53, for which judgment is demanded. Intervener, the Home State Bank, pleaded in substance that June 1, 1918, it agreed with defendants to purchase all the capital stock of the Dunning State Bank and thus to merge its assets into the intervening bank; that defendants then agreed to guarantee such assets; that the sale and transfer of stock were made for and on behalf of intervener through and in the name of Cooper, he being then, and for a long time thereafter, intervener's principal stockholder, its president, and a director; that, pursuant to the contract, defendants assigned the capital stock of the Dunning State Bank to intervener, it becoming the owner and assuming the liabilities of the Dunning State Bank, which became defunct; that intervener performed its agreements, and that defendants breached their con-

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tract by refusing to pay intervener the amount due it on the unpaid guaranteed notes.

In an answer to the petition of intervener defendants, among other defenses, denied that Cooper entered into the contract on behalf of intervener; denied that intervener was a party to the contract or a party in interest, and denied that defendants ever entered into any contract with intervener to sell their capital stock or to guarantee payment of the notes in controversy. Defendants pleaded further that Cooper had no authority to act for intervener in purchasing the capital stock of the Dunning State Bank, and that intervener could not lawfully, and did not, make such a purchase. A trial of the controversy between intervener and defendants resulted in a verdict in favor of intervener, upon which a judgment for \$6,426.36 was entered. Defendants appealed. A hearing in the appellate court resulted in an affirmance on the grounds stated in a former opinion. *Cooper v. Bane, ante*, p. 74. Upon a motion by defendants for a rehearing, the case was reargued and again taken under advisement.

At the former hearing Cooper's authority to act for the Home State Bank, intervener, in purchasing the entire capital stock of the Dunning State Bank, the legality of such a purchase in view of a statute prohibiting it, and the sufficiency of the evidence to sustain a finding that defendants sold their stock to intervener, instead of to Cooper, were propositions controverted in the argument of defendants, but not discussed as determining factors in the opinion delivered. *Cooper v. Bane, ante*, p. 74. When the case was reargued, the negative of these questions was again presented by defendants and seems to require further consideration.

Disregarding the question whether a person not disclosed by a written contract may prove by parol that it was, for his benefit, entered into by a nominal party to the written instrument, the contract here in controversy is evidence that Cooper for his individual benefit entered

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into it with defendants. This is affirmatively shown by the writing itself and nothing to the contrary appears therein. The contract declares on its face that Cooper is the party of the second part. All the obligations assumed by defendants run to him, individually without any reference to agency or to any other persons or corporation. Consistently with the terms of the instrument itself, it was signed by Cooper in his own name as the party of the second part. In their pleadings defendants and intervener alike rely on the contract—the former as written and the latter as shown by parol to express a mutual intention to make intervener the party of the second part, or the real purchaser of the capital stock of the Dunning State Bank. In absence of oral proof defendants would be entitled to judgment on the face of the written instrument.

Does the evidence show that Cooper had authority to act for the Home State Bank, intervener, in buying the capital stock of the Dunning State Bank? Though he was the principal stockholder, president and a director of intervener, he was not the bank itself. Buying the capital stock of a rival state bank was not an ordinary banking transaction within the powers of a stockholder, the president, or a single director, or all combined. The statute provides:

“The affairs and business of any banking corporation transacting business under the laws of this state shall be managed or controlled by a board of directors.” Comp. St. 1922, sec. 8007.

There is no evidence that, in advance, intervener's board of directors authorized Cooper as an officer or a director or a stockholder or as an agent to buy the capital stock of the Dunning State Bank or to require defendants to guarantee payment of notes as assets acquired by means of the transfer.

Assuming that the acts of Cooper were the acts of the intervening bank, could the latter by itself or by Cooper

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buy the entire capital stock of the Dunning State Bank? The statute declares:

"No corporation transacting a banking business shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, or the shares of any corporation, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith." Comp. St. 1922, sec. 8006.

The capital stock in the present instance was not purchased or held "to prevent loss upon a debt previously contracted in good faith." The execution of the contract, therefore, if shown by parol to have been entered into by Cooper for intervener, was forbidden by statute, and, if thus made, was illegal and unenforceable. It necessarily follows that intervener failed to show by parol or by the contract pleaded or by both that defendants legally sold the capital stock of the Dunning State Bank to the Home State Bank, the contract itself reciting that Cooper was the purchaser.

The position of intervener cannot be maintained by separating the guaranty and the transferred assets from the sale of the capital stock. The sale by which the assets were incidentally transferred and the guaranty are parts of an indivisible contract pleaded in its entirety by both intervener and defendants. Intervener, considered as the party which purchased the capital stock from defendant, acquired the assets by means of a forbidden illegal sale. Thus considered the transfer of the notes was a mere incident of the principal transaction. Neither the Dunning State Bank nor defendants indorsed the notes. Intervener, therefore, considered as the holder of the capital stock under an invalid purchase, cannot enforce the guaranty. In that situation the guaranty falls with the invalid purchase—the principal contract.

Did defendants in entering into the contract intentionally unite with intervener in a mutual understanding to consolidate the two banks? The statute declares that

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"no consolidation shall be made without the consent of the department of trade and commerce." Comp. St. 1922, sec. 8021. There is no proof that, prior to the execution of the contract, the banks, or either of them, had the consent necessary to consolidation. Defendants parted with their capital stock, transferred the assets of the Dunning State Bank to the purchaser, and resigned as officers without any permission to consolidate the two banks. Neither the shares of the capital stock of the Dunning State Bank nor the assets thereof were turned over to intervener while in the control of defendants. An assignment of each stock certificate was signed in blank by the owner, one of the defendants. The assets, including the notes in suit, were not indorsed by any defendant, or by the Dunning State Bank, but remained in that institution for ten days at least after the transfer of the capital stock. The contract was executed June 1, 1918. Immediately thereafter Cooper, at a meeting of the new stockholders, was elected president of the Dunning State Bank, one of his associates vice-president, and another cashier. In this election by the new stockholders of the Dunning State Bank, Cooper and his associates controlled its capital stock and assets as individual owners. As thus reorganized, the Dunning State Bank was conducted as a commercial banking institution in its original name until June 12, 1918. It was not definitely known until June 11, 1918, that the Home State Bank would purchase the stock and assets of the Dunning State Bank and agree to a consolidation. There is no proof whatever that the department of trade and commerce consented to a consolidation while defendants had an interest in the Dunning State Bank or the right to enter into an agreement to consolidate it with the Home State Bank. Considering the evidence in the light of the contract, reciting as it does in unambiguous language that Cooper was the purchaser, there cannot, in reason, be a finding that defendants mutually and intentionally agreed with intervener to consolidate the two banks and that they put their agreement

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in the written instrument pleaded by all parties to this action. There is an inference, however, that consolidation was mentioned in the preliminary negotiations, and that one, or perhaps two, of the defendants had knowledge of a wish on the part of Cooper to consolidate the two banks. This falls far short of an agreement by defendants to unite with intervener in a mutual consolidation, even if the department of trade and commerce had consented thereto. Intervener did not make a case against defendants. The judgment against them cannot stand.

In view of the conclusion reached on these phases of the case, it is unnecessary to reexamine the principles of law announced in *Cooper v. Bane*, ante, p. 74, though criticised as unsound. The former opinion is withdrawn, the affirmance set aside, the judgment below reversed and the cause remanded for further proceedings.

REVERSED.

MANLES ACREE, APPELLEE, v. ROY NORTH ET AL.: UNION
PACIFIC RAILROAD COMPANY, APPELLANT.

FILED MARCH 27, 1923. No. 22294.

1. **Assault and Battery:** ABETTOR. "In an assault and battery, not only he who is the actor or actual perpetrator of the offense, but he also who, being present when the act is done, aids and abets therein, is a principal and liable as such at the suit of the injured party." *Cooney v. Burke*, 11 Neb. 258.
2. —: INSTRUCTION. Evidence examined, and *held* an instruction embodying the above doctrine properly given.
3. **Appeal:** DAMAGES: INSTRUCTION. Where, in an instruction upon the measure of damages, the jury are inadvertently told that they might compensate plaintiff for (among other things not complained of) "loss of time, if any * * * has been shown by the evidence," when it appears that plaintiff made no claim for loss of time, either in his petition or in the evidence, it will be *held* not to be reversible error, nor to require a remittitur of the judgment, where it is reasonably certain the jury were not misled thereby, and the amount of the judgment can be sustained on other elements of damage not objected to, and the defeated party makes no complaint of the amount.

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4. **Assault and Battery: REFUSAL OF INSTRUCTION.** In a civil action for assault and battery, where the evidence conclusively shows that the defendants made a voluntary attack upon plaintiff without provocation, and were the sole active aggressors throughout the assault, the plea of self-defense has no proper place in the transaction, and an instruction tendered looking to the exoneration of defendants on that ground is properly refused.
5. **Evidence: ADMISSIBILITY: PRIVILEGED COMMUNICATIONS.** Where it appears from the evidence that a physician, in his professional capacity, treated the plaintiff for injuries sustained to his face and jaw from an assault by defendants, and that prior thereto he had seen plaintiff at different places on the street, but where it further appears that on one or more occasions prior to seeing him on the street he had also, in his professional capacity, treated the plaintiff for facial paralysis, such physician will not be permitted to testify, over the objection of plaintiff that the same would be a violation of the privilege existing between physician and patient, what the difference was, if any, in the appearance of plaintiff's jaw and face at the time he treated him for his injuries from the assault above mentioned and the time he had seen him on the street, at least until, if at all, it is first shown that the witness is able to and will separate and discriminate the knowledge and information gained in his professional capacity from that gained in a nonprofessional capacity and base his answer solely upon the latter, and the witness not having thus qualified himself, the objection was properly sustained.

APPEAL from the district court for Cheyenne county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

C. A. Magaw, Douglas F. Smith and Thomas F. Hamer,
for appellant.

Halligan, Beatty & Halligan, contra.

Heard before MORRISSEY, C. J., ROSE, GOOD and ALDRICH,
J.J., RAPER and TROUP, District Judges.

TROUP, District Judge.

Action on the part of plaintiff, Manles Acree, against defendants, Union Pacific Railroad Company, John Schell, and Roy North, to recover damages for assault and battery and false arrest.

For first cause of action plaintiff, in substance, alleges that defendants Schell and North were employed by de-

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fendant railroad company as private detectives to guard the grounds and trains of defendant company in and about the town of Sidney, Nebraska, to prevent depredations thereon and remove trespassers therefrom; that on July 3, 1920, the plaintiff, a farm-hand living three miles east of Sidney, drove into the town in his automobile, placed the same in a garage, remained in town until about 10 o'clock p. m., at which time, leaving his car in the garage for repairs, he started to walk on the Lincoln highway toward his home; that plaintiff had proceeded on said highway to a point near the east corporate limits of the city, when defendants Schell and North, being under the impression that plaintiff had committed or was about to commit some trespass upon the property of the railroad company, made an assault upon the plaintiff, beating and striking him upon the head and face, knocking him to the ground several times, striking and beating his jaw with a revolver and cutting numerous gashes upon his head and face; that on account thereof plaintiff suffered great bodily pain and injury, was compelled to pay a physician \$50 for treatment of his wounds, all to his damage in the sum of \$2,550.

For his second cause of action plaintiff reavers the substance of the facts above stated, and alleges that after the commission of the assault, as above set forth, defendants Schell and North did unlawfully and forcibly arrest said plaintiff, forcing him to give bond for his release, to his damage in the sum of \$450, for all of which plaintiff prays judgment for \$3,000.

The defendants each file separate answers. The defendant railroad company, for its answer, admits that defendant Schell was employed by the defendant company to guard and protect its property in the yards in and about Sidney, but denies each and every other allegation in plaintiff's petition.

The answer of defendant Schell is identical in substance to that of the railroad company.

The answer of defendant North denies that he was in

the employ of defendant railroad company at the time in question, and denies each and every other allegation in plaintiff's petition, except such as may be admitted in his answer. Further answering, defendant North alleges that on the night stated he was in company with defendant Schell, who at that time was engaged as night watchman for defendant company, and that at the time referred to this defendant and Schell saw plaintiff loitering in a suspicious manner upon the right of way of defendant railroad company; that, as defendants approached plaintiff, plaintiff attempted to escape by running, and, defendants giving chase, commanded plaintiff to halt, whereupon plaintiff drew a pistol and pointing same at Schell, this defendant fearing for his life, struck plaintiff, but only with such force as was necessary to prevent great bodily injury to said Schell.

Plaintiff's several replies to the respective answers deny each and every allegation therein contained, except only such as are admissions of allegations of plaintiff's petition. A trial before a court and jury resulted in a verdict and judgment for plaintiff for \$3,000. The defendant railroad company only appeals.

Except that defendant North was not in the employ of defendant company, but was a volunteer on the occasion in question, we think it fair to say that the allegations of plaintiff's petition are well sustained by the evidence as to both causes of action. We think it also fair to say that from the evidence of defendant Schell and North it appears that, as they were passing down the railroad track on the night referred to, they saw three men in the vicinity of the railroad company's cars containing merchandise, acting in a suspicious manner, and, as defendants approached, one of the three escaped in a southeasterly direction, the other two in a slightly different direction, and it was while defendants were returning from a chase of the latter two that they discovered plaintiff walking eastward on the Lincoln highway, and, supposing him to be the first of the three who escaped, accosted him, and

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the assault quickly followed substantially, as plaintiff alleges. The plaintiff, however, did have a pistol in his possession at the time of the assault, which he says he took from his car in the garage as he was about to start for home, and which he says he held in his hand by his side as he proceeded homeward on the highway.

The defendant presents several assignments of error, the first of which is to an instruction designated as No. 9, wherein the court told the jury, in substance, that even if they should find from the evidence that defendant Schell did not actually strike plaintiff, yet if he was present and did aid, abet and encourage defendant North to commit the assault, and that at the time of so doing he was acting within the scope of his employment with the railroad company, as explained in other instructions, then Schell and the railroad company would be equally liable with defendant North. The defendant does not criticise this instruction as a correct statement of the law, but claims there was no place for it in the evidence. To this, of course, we cannot agree. The plaintiff testified that Schell actually struck him. While defendants deny this, they both testify that Schell climbed over the railroad fence, intercepted the plaintiff as he was walking on the public highway, commanded him to stop and throw up his hands, and, while North immediately set upon him and beat him, Schell stood by with a flashlight in one hand and a loaded revolver in the other, and after the assault took hold of plaintiff and, together with North, forced him to the courthouse, where, as the evidence shows, both Schell and North insisted that he be thrown into jail, and only upon giving bond was he released. This was amply sufficient in fact to justify the instruction. So, also, was it sufficient in law. "In an assault and battery, not only he who is the actor or actual perpetrator of the offense, but he also who, being present when the act is done, aids and abets therein, is a principal and liable as such at the suit of the injured party." *Cooney v. Burke*, 11 Neb. 258.

Objection is also made to an instruction pertaining to

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the measure of damages, wherein the court told the jury it might compensate plaintiff for (among other things not complained of) "loss of time, if any * * * has been shown by the evidence." The plaintiff made no claim for loss of time either in his petition or in the evidence, and this clause evidently slipped into the instruction inadvertently. We have some doubt if its insertion is such a fault as to be characterized as being even technically erroneous. The jury were told it might compensate for loss of time, *if any has been shown by the evidence*. The plain inference follows that, if there was no loss of time shown by the evidence, then it might not compensate for that. It is reasonably certain the jury were not misled, and that it allowed nothing therefor. Certainly the inadvertence is not such error as to require a reversal of the case, nor do we think even a remittitur from the judgment. The amount, at most, would be comparatively inconsequential. The amount of the verdict can be sustained on other elements of damage not objected to, and the defendant makes no complaint as to the amount. See, upon this point, *Chicago, R. I. & P. R. Co. v. Archer*, 46 Neb. 907.

Defendant complains of the refusal to give an instruction tendered, to the effect that if the jury found certain facts not to exist the defendant Schell and the railroad company would not be liable. The court had already instructed the jury, as to the same state of facts, to the effect that if they found said facts to exist they might find defendants Schell and the railroad company liable. It can hardly be said to be necessary to repeat the same proposition in the negative form.

Another instruction tendered by all the defendants and calculated to apply to all, but refused by the court, invoked the defense of self-defense. Self-defense is an affirmative defense, and under a general denial only evidence of justification is admissible. *Barr v. Post*, 56 Neb. 698; *Mangold v. Oft*, 63 Neb. 397, and cases cited. Neither the railroad company nor Schell pleaded self-defense, and

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neither was therefore entitled to an instruction looking to exoneration on that ground. North alone pleaded self-defense, but even if all had so pleaded it would have been proper to have refused the instruction. The whole evidence utterly precludes the idea of self-defense, and no part of the evidence shows this more positively than that of the defendants Schell and North themselves. They were the active aggressors from start to finish, and the plaintiff was the aggressor at no time. It is true the defendants claim that when plaintiff got up he "came right up at him (North), started up with hands kind-of stuck up, and North hit him a couple of times more;" but it must be remembered that this was at a time after plaintiff had been knocked down once or twice, and North stood on one side of him with plaintiff's pistol in his hand and Schell on the other side with his own pistol in his hand, and plaintiff completely unarmed. Under these circumstances it is more than likely plaintiff's uplifted hands indicated a complete surrender on his part. Certainly plaintiff was in a poor position to become the aggressor, and defendants were in a worse position to claim that to knock him down under these circumstances and break his jaw they were acting in self-defense. "The doctrine of self-defense cannot successfully be invoked, however, where defendant's own acts brought on the difficulty with plaintiff." 5 C. J. 636, sec. 32. The instruction was properly refused.

Numerous assignments of error are made to the admission or rejection of testimony, only one of which, however, we think calls for special mention. Doctor Mantor was the defendant railroad company's regular physician at Sidney; he was also the physician who treated plaintiff for his injuries received from the assault, and on one or more prior occasions had treated plaintiff for other ailments, including facial paralysis. The plaintiff calling Doctor Mantor to the stand, he was asked to describe plaintiff's injuries, which he did, and among other things stated that he had sustained a fracture of the jaw. Upon

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cross-examination he was asked if upon a prior occasion he had not treated the plaintiff for facial paralysis, and, upon stating that he had, he was then asked in a series of questions to state the condition of plaintiff's facial paralysis at that time; what effect the same had upon the muscular movements of the jaw or face, and what, if any, difference he observed in the condition of his face and jaw at his prior treatment and now. Objections to these questions were sustained on the ground of improper cross-examination and privileged. The defendants, then calling the doctor as a witness in their own behalf, asked him whether or not he had seen the plaintiff at different places on the street prior to the treatment of his present injuries, and, answering that he had, the witness was then asked: "Will you state whether or not there was any difference in the appearance of his jaw at the time you treated him on the 7th and in the time that you had seen him on the street prior to that?" Plaintiff objected to any answer thereto, "for the reason that the relation of physician and patient existed and any communication or information obtained by the doctor in the treatment would be privileged," which objection was sustained. This ruling seems to be regarded by defendant as a serious error and from it is sought to be raised the legal inquiry: How far may a physician be permitted to testify as to the physical condition or appearance of one from facts gained in a nonprofessional capacity whom he has before treated for the same or like conditions in a professional capacity? But we are of the opinion that upon the existing state of the record the inquiry suggested is not properly reached. The witness had not been properly qualified and the question put to him was premature, so, if but for that reason alone, the objection was properly sustained. The doctor at no time stated, nor at any time was he asked to state, whether or not he could give the information required of him by the question based solely upon his knowledge of the plaintiff derived unprofessionally, to the entire exclusion of knowledge derived profes-

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sionally. This was essential to his competency to testify at all. Suppose he had been asked whether or not he could entirely separate and distinguish these two sources of knowledge and he had answered that he could not, that would have disqualified him for further inquiry. He was not asked to make this discrimination and at no time was it intimated to him that he must do so in order to render his answer to the question a proper one. Under these circumstances the witness was left at perfect liberty to draw to the fullest extent upon his experience, knowledge and information, gained while treating the plaintiff as a patient, and impress the same upon any answer he might make. This the witness could not be permitted to do. See, upon this point, *Larson v. State*, 92 Neb. 24.

Other assignments presented in defendant's brief and not mentioned herein are regarded as immaterial. Finding no reversible error in the record, the judgment of the lower court is

AFFIRMED.

CENTURY OIL COMPANY ET AL., APPELLANTS, V. DEPARTMENT OF AGRICULTURE ET AL., APPELLEES.

FILED MARCH 30, 1923. NO. 23277.

Constitutional Law: INSPECTION FEES. In practical operation under existing conditions, the statutory fee of six cents a barrel for the governmental inspection of gasoline creates an excessive fund in the nature of revenue in addition to the costs of inspection, and for that reason violates the constitutional provision relating to taxation, according to the ruling in *State v Standard Oil Co.*, 100 Neb. 823, Comp. St. 1922, sec. 7456; Const. 1875, art. IX, sec. 1.

APPEAL from the district court for Douglas county:
CARROLL O. STAUFFER, JUDGE. *Reversed.*

William H. Herdman, Kennedy, Holland, De Lacy & McLaughlin, Baldrige & Saxton and Crossman & Munger, for appellants.

O. S. Spillman, Attorney General, and W. C. Dorsey, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE, DAY and GOOD, JJ.

PER CURIAM.

This is a suit for an injunction to prevent the enforcement of the statutory provision fixing the fee for the governmental inspection of gasoline at six cents a barrel, on the ground that the legislation is unconstitutional. The district court upheld the fee and dismissed the suit. Plaintiffs have appealed.

The decision on appeal is controlled by a former ruling. A fee of ten cents a barrel, fixed by an earlier act otherwise identical with the present one, was held to be excessive, unconstitutional, and void. In practical operation under existing conditions, the statutory fee of six cents a barrel for the governmental inspection of gasoline creates an excessive fund in the nature of revenue in addition to the expenses of inspection, and for that reason violates the constitutional provision relating to taxation, according to the ruling in *State v. Standard Oil Co.*, 100 Neb. 826. Comp St. 1922, sec. 7456; Const. 1875, art. IX, sec. 1. In considering in the case cited the provision fixing a fee of ten cents a barrel, the legislation was treated as an act limited by its title to inspection under the police power. Had the fee under an appropriate title extended to revenue or an excise tax, a different question would have been presented. The supreme court of the United States recently held that the legislature may in the same act impose upon domestic commerce in gasoline a fee sufficient to pay the expenses of inspection under the police power, and to raise also under the taxing power a surplus in the form of an excise burden, which is not a tax on property. *Texas Co. v. Brown*, 258 U. S. 466. Under the legislation as it now stands, plaintiffs are entitled to an injunction to prevent the collection of the inhibited fee. For the purpose of granting that relief, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

De Conly v. Winter Creek Canal Company.

FRANK DE CONLY, APPELLEE, v. WINTER CREEK CANAL
COMPANY, APPELLANT.

FILED APRIL 10, 1923. No. 22190.

1. **Easements:** NOTICE. One who purchases land burdened with an open and visible easement is charged with notice of the same, and the estate he purchases is servient to the easement.
2. **Waters:** EASEMENT: INJUNCTION. Where an irrigation canal company, with the consent of a drainage district and the owner of a tract of adjacent land affected by flowage, constructed works whereby it was enabled to use water discharged from the drainage ditch into its canal for irrigation purposes, which use had continued for several years, a subsequent purchaser of the land affected may not restrain this use of the water upon the ground that the canal company had not acquired the right to appropriate the water.

APPEAL from the district court for Scotts Bluff county:
RALPH W. HOBART, JUDGE. *Reversed.*

F. A. Wright and Mothersead & York, for appellant.
Morrow & Morrow, contra.

Heard before MORRISSEY, C. J., DEAN, LETTON and
ALDRICH, JJ., TROUP, District Judge.

LETTON, J.

One De Conly brought this action to enjoin the Winter Creek Canal Company, hereinafter termed the defendant, from obstructing the flow of water in a drainage ditch belonging to Drainage District No. 1 of Scotts Bluff county, alleging that this caused his land to be damaged by seepage water and floods. De Conly afterwards died and the suit was revived in the name of his executor. A permanent injunction was allowed. Defendant appeals.

The De Conly tract of about 120 acres of land lies in the valley of the North Platte river with higher lands to the north and west. A drainage ditch flows south along the boundary of the land to a point where it intersects the north bank of the irrigation canal of the defendant. Previous to the formation of the drainage district and the excavation of one ditch nearly all of this

land was wet and swampy. This condition was caused by the seepage of water from higher lands which were under irrigation from other canals at a higher level. It was almost totally unfit for cultivation on account of this condition. Under the articles of incorporation the south boundary of the drainage district is the north bank of the canal of the Winter Creek Canal Company.

When the ditch was excavated, a concrete structure was erected at its point of discharge into the canal. This structure had several gates. One of these sluice gates, when opened, permitted the waters from the drainage ditch to flow through a sluice under the irrigation canal, discharging on the other side of the canal. Except when the gate was opened, the water in the ditch flowed through another channel in the structure, into the canal of defendant, and the waters were used for irrigation purposes.

The facts are undisputed that Harrison, the then owner of the land, took an active part in the organization of the drainage district soon after the year 1911. He was one of its directors, and was fully informed of the nature and purpose of the concrete structure erected by the canal company at the point of discharge of the waters of the ditch into the canal of defendant. He made no objection to the manner in which the outlet was constructed. The ditch was of immediate benefit to his land, reclaiming the greater part of it and rendering it susceptible to cultivation. He continued to farm the land for several years after the works were finished before he sold it to Mr. De Conly. These works were in full view of any ordinary observer. De Conly was familiar with the locality and purchased the land in 1917 with full knowledge of the existence of the easement created by the ditch. De Conly testified that the sluice underneath the irrigation canal is kept open six or seven months every year, but it is closed during the remainder of the year; that, on account of the water table in the soil being raised by the closing of the gate

and the retention and consequent elevation of the level of water in the drainage ditch, his land has become permeated with seepage water, and a large acreage of alfalfa killed.

The fact that the water level in the ditch was raised when the sluice gate was closed, and that the water was discharged into the irrigation canal by means of the concrete structure, was open and obvious. Both the irrigation canal and the drainage ditch are works of public utility. The law does not permit one who purchases land with notice that it is burdened with a public easement, to destroy the purpose which the easement subserves by means of a writ of injunction. He takes the property subject to the easement, and has no greater rights than his grantor. This is not a new question in this state. *Fremont, E. & M. V. R. Co. v. Gayton*, 67 Neb. 263; *Znamanacek v. Jelinek*, 69 Neb. 110; *Arterburn v. Beard*, 86 Neb. 733; *Seng v. Payne*, 87 Neb. 812; *Moll v. Hagerbaumer*, 98 Neb. 555; 19 C. J. 939, sec. 145.

In *Arterburn v. Beard*, *supra*, the evidence showed that the plaintiff, who sought an injunction, was familiar with the locality and knew of the existence and use of the ditch or canal at the time he bought the land. The court held that he was charged with notice of the easement, and the estate that he purchased was servient to the same.

This principle applies here, and plaintiff is not entitled to injunctive relief. The question whether the defendant has acquired an appropriation to the water in the ditch is not one that can be raised by De Conly, since he is not charged with the protection of public right, if any, to the use of the water.

A number of other points are raised, but under the view we take it is unnecessary to consider them. What has been said is without prejudice to a right of action, if any plaintiff has (as to which we express no opinion), for damages caused by the flooding of his crops and resulting from the negligent operation of the ditch and

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sluiceway. He may therefore be permitted to amend his pleading in this suit to permit such an issue to be raised, if the facts justify it.

REVERSED AND REMANDED.

CORNELIUS DELOUGHERY, APPELLANT, v. JAMES J. LAPSLEY
ET AL., APPELLEES.

FILED APRIL 10, 1923. No. 22356.

1. **Highways:** ESTABLISHMENT BY CONSENT. Consent roads cannot be established under section 2598, Comp. St. 1922, unless "the written consent of all the owners of the land to be used for that purpose be first filed in the county clerk's office."
2. ———: ———. The mere signing and filing of a petition for the establishment of a road by a landowner, a portion of whose land will be taken for the highway if it be established, is not sufficient to constitute the "written consent" required by the statute for the establishment of a road by consent, and in such case proceedings under sections 2568 and 2590, Comp. St. 1922, are required.

APPEAL from the district court for Dakota county:
GUY T. GRAVES, JUDGE. *Affirmed.*

C. A. Kingsbury and Sidney T. Frum, for appellant.

George W. Leamer, contra.

Heard before MORRISSEY, C. J., LETTON, DAY and DEAN,
JJ., BUTTON, District Judge.

LETTON, J.

Relator seeks a peremptory writ of mandamus commanding the board of county commissioners of Dakota county to order an appraisal of damages to land affected by the establishment of a certain alleged highway, and to order the highway opened and placed in condition for public travel. A general demurrer to the petition was sustained, and the proceedings dismissed. Relator appeals.

It is alleged that relator filed a petition for the location of a highway with the county clerk, signed by himself and 26 resident electors residing within five miles

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of the proposed highway; that the plaintiff and Frank Davey are the owners of all the real estate over and along which the proposed highway was established; that they both signed the petition; that the board of county commissioners, while in legal session, ordered that this road be "allowed as per petition on file, damages to be appraised." It is also alleged that the board refused to order an appraisal of damages, or to open the road, as requested.

There are two methods provided by statute for the establishment and opening of public roads. One is by filing with the county clerk a petition signed by at least ten electors residing within five miles of the road, the deposit of money with that office to cover the expenses if the road is not finally established, a view and report by the county surveyor, if the report is favorable notice by personal service upon owners of land affected, and by publication of the time within which objections and claims for damages must be filed. Section 2568 *et seq.*, Comp. St. 1922.

The other method of establishing a road is as follows: "Public roads may be established without the appointment of a commissioner, provided the written consent of all the *owners of the land to be used for that purpose* be first filed in the county clerk's office; and if it is shown to the satisfaction of the county board that the proposed road is of sufficient public importance to be opened and worked by the public, they shall make an order establishing the same, from which time only shall it be regarded as a public road." Comp. St. 1922, sec. 2598. This section is a little ambiguous. It may be construed to mean that its only purpose was to dispense with the appointment of a commissioner (which was required before the amendment to section 2568, making the county surveyor commissioner), and yet retain all the other requirements of the statute, such as service of notice, filing of claims and objections, appraisal of damages, and hearing. It may, however,

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be construed as providing a means for making the establishment of roads by dedication a matter of public record. The provision that "the written consent of all the owners of the land to be used for that purpose" must be filed before the road is established evidently means consent to the use of the land for the highway, as well as consent to the establishment of the road. There is a distinction between the signing of a petition for the establishment of a road and the filing of a written consent of the owners of the land to be used for the purpose. A landowner may be willing to sign a petition to have the road established, and yet be unwilling to waive damages and dedicate his land to the use of the public for a highway.

In *Warren v. Brown*, 31 Neb. 8, the facts were that a county board had made an order establishing a road. No commissioner was appointed, no notice given, and no damages appraised. It was urged that the road was established by consent, but the court said, speaking of the owners of the land sought to be taken for highway purposes: "They did not sign the petition or application made to the board for the establishment of the road, nor did they file in the county clerk's office written consent that their land might be appropriated for that purpose. The filing of such written consent was necessary to confer jurisdiction upon the county board to establish a consent road. Without it their proceedings are a nullity." It was held that the county board had no jurisdiction to establish a public road when no commissioner had been appointed to examine into and report upon its expediency, unless the written consent of all the landowners whose land was sought to be taken for that purpose was first filed with the county clerk.

This construction of the statute was made over 30 years ago and has been largely followed by county authorities. The requisite proceedings for the establishment of a consent road not having been had, the county

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board was justified in its refusal to accede to the request of relator.

AFFIRMED.

**JOHN NEDELA, APPELLANT, V. MARES AUTO COMPANY,
APPELLEE.**

FILED APRIL 10, 1923. No. 22860.

1. **Appeal:** LAW OF THE CASE. The rule known as "the law of the case" is applicable only to legal principles enunciated and rules of law laid down by a reviewing court, but has no relation to decisions upon questions of fact where the evidence at the second trial is materially different from that adduced at the first, or where evidence upon a material point which is lacking at the first trial is produced upon the second.
2. **Master and Servant:** COMPENSATION: ELECTION. Where an employer and employee enter into a contract of employment after the taking effect of the workmen's compensation act, both are presumed to contract with reference and subject to the provisions of part II thereof, but where the employer does not insure for the benefit of his employees, or fails to furnish satisfactory proof to the compensation commissioner of his ability to pay compensation awarded, as provided in section 3069, Comp. St. 1922, he is liable to an action for damages on account of negligence, if the facts so warrant, or to pay compensation under the statute, at the election of the employee.
3. ———: ———: STATUTE: CONSTITUTIONALITY. Section 3687, Rev. St. 1913, as amended, now section 3069, Comp. St. 1922, is not void and unconstitutional as being an amendment of section 3653, Rev. St. 1913, as amended, now section 3035, Comp. St. 1922, without mentioning or repealing said section, but is valid as being supplementary legislation.
4. ———: NEGLIGENCE: QUESTION FOR JURY. Evidence adduced on the part of plaintiff examined, and *held* sufficient to carry the question of the existence of negligence on the part of the employer to a jury for their decision.

APPEAL from the district court for Saline county:
RALPH D. BROWN, JUDGE. *Reversed.*

Bartos & Bartos and Grant G. Martin, for appellant.

Crofoot, Frazer, Connolly & Stryker and B. V. Kohout, contra.

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Heard before MORRISSEY, C. J., LETTON, DEAN and ALDRICH, JJ., RAPER, District Judge.

LETTON, J.

Plaintiff recovered a judgment against defendant for personal injuries. This judgment was appealed to this court and reversed generally (*Nedela v. Mares Auto Co.*, 106 Neb. 883), for the reason that the evidence showed that both plaintiff and defendant were under the employers' liability act.

At the second trial defendant moved that plaintiff be required to elect whether he would proceed under the common law or under the employers' liability act. Plaintiff stated that he had elected at the former trial to proceed under the common law, and he stood upon that election. At the close of plaintiff's testimony, defendant moved for a directed verdict "in conformity with the mandate of the supreme court of Nebraska heretofore returned and filed in this case, and because the plaintiff's evidence is insufficient to constitute a case in favor of the plaintiff and against the defendant." This motion was sustained and the jury instructed that, "under the opinion of the supreme court rendered in this case, you should return a verdict in favor of the defendant." The action was then dismissed. Plaintiff has appealed.

On the former appeal defendant insisted that both parties were under the employers' liability act. Plaintiff argued that the defendant had not shown that the parties were under the provisions of part II of the act, because they did not prove that they had complied with the provisions of section 3687, Rev. St. 1913, as amended, now section 3069, Comp. St. 1922, and that therefore he was entitled to recover for negligence under the common law. This court held that it was not necessary for defendant to prove compliance with this section, as this would be presumed. At the second trial plaintiff furnished conclusive proof that defendant had not complied with this section, and therefore was not within the statute.

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Defendant now insists that plaintiff was not entitled to make this proof, and that the decision of this court upon the former trial settled the law to the effect that both parties were under the employers' liability act, and the district court took this view. We think the court misapprehended the effect of the former decision. The case was reversed generally. At another trial plaintiff was entitled to furnish additional evidence, if necessary, to maintain his cause. A decision of a reviewing court upon the facts does not constitute the law of the case, unless the evidence at the second trial is the same, or substantially the same, as that adduced at the first trial. When an element essential to plaintiff's recovery is lacking in the first trial, but is proved at the second trial, this additional evidence cannot be ignored, and the legal questions presented must be determined according to the new aspect of the evidence. *Lane v. Starkey*, 20 Neb. 586; *Missouri P. R. Co. v. Fox*, 60 Neb. 531; *State v. Paxton*, 65 Neb. 110; *Gadsden v. Thrush*, 72 Neb. 1; *Sowerwine v. Central Irrigation District*, 91 Neb. 457. The court therefore erred in instructing the jury that plaintiff was concluded by the opinion of the supreme court.

It is next contended that section 3687, Rev. St. 1913, as amended, now section 3069, Comp. St. 1922, is unconstitutional because it amends section 3653, Rev. St. 1913, as amended, now section 3035, Comp. St. 1922, without mentioning it. The act has been amended several times since 1913. As originally written section 3687 merely provided that an employer might take out liability insurance. The section as amended provides in substance that every employer shall insure his liability under the act, or he "shall furnish to the compensation commissioner satisfactory proof of his financial ability to pay direct the compensation in the amount and manner when due as provided for in this act," and every employer who refuses to comply with the conditions set forth in the section "shall be deemed to have elected not

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to come under part II hereof, and shall be required to respond in damages * * * in like manner as if the employer had filed an election with the compensation commissioner rejecting the provisions of part II." Section 3653 (Comp. St. 1922, sec. 3035) provided: "Every such employer and every employee is presumed to accept and come under part II hereof, unless prior to accident he shall signify his election not to accept or be bound by the provisions of part II," etc. As the law stood, an employer was under part II unless he gave either written or printed notice to the employee that he does not accept the provisions of part II. Under section 3687, as amended, now section 3069, Comp. St. 1922, if the employer fails to insure or fails to satisfy the commissioner as to his financial ability, he shall be deemed to have elected not to come under part II.

The amended section does not amend section 3653, but merely furnishes another method of evidencing that the employer does not elect to bring himself within the provisions of the act. Failure to insure allows the employee to elect whether to apply for compensation under the statute, or to depend upon legal remedies for damages for negligence. *Avre v. Sexton*, p. 149, *post*.

It is next urged that the evidence does not establish any negligence on the part of defendant. Was there sufficient evidence presented by the plaintiff to require submission of this question to a jury? The former opinion does not fully state the facts. In addition to those recited in that opinion, it appears that on the evening of December 21, 1921, the manager called Nedela to a bench near which he was standing and asked him to hold the wheel of a Ford automobile which he had placed vertically upon the bench. Plaintiff held it by the rim. The manager was trying to move the ball cones from the inside of the hub. He put a punch inside the hub and struck it with a hammer. Immediately a small piece of steel flew out and entered plaintiff's eye, from the result of which it became necessary to remove the eye.

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The testimony on behalf of plaintiff by men experienced in such work is that the usual and customary method of removing the ball cones from such wheels is by holding the wheel against the workman's knee, or against the bench at such an angle that, when the punch is inserted from the upper side, and struck by a hammer, there is little danger from pieces of steel flying into the face, or if the cones are difficult to remove, the wheel is placed over a nail keg, or in a vise, flatwise, so that the punch is directed downwards, it being dangerous to perform such work unless the wheel is in such a position that the sparks are not liable to be driven or fly into the eyes of the workman. There is also testimony that it is not customary for more than one man to remove these cones, as it is easily done if the wheel is properly placed.

Since a verdict was directed at the close of plaintiff's testimony, there is no evidence to contradict these statements, and there was sufficient evidence to take the question of negligence to the jury, unless the defendant's contention is sound that, a punch and hammer being simple tools, and not being shown to be in any wise defective, there can be no negligence as a matter of law in their use by the defendant's manager. Attention is called to the fact that plaintiff testified, when cross-examined, that if a punch was put against a piece of iron, or steel, and hit with a hammer, sometimes a chip might fly off. The cases cited by defendant hold that there can be no negligence if the tools furnished by a master are simple tools, defects in which can be readily observed by the workman, and, further, that a master cannot be held liable for either latent or visible defects in such tools. But it is not shown that there was any defect in either the hammer or the punch. The negligence, if any, was not in the condition of tools furnished, but was in the manner in which the tools were used, and, according to the testimony of his witnesses, in placing plaintiff in a very dangerous and

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hazardous position, and which dangerous situation plaintiff, by reason of his inexperience, did not apprehend. Plaintiff had not participated in work of this nature before, although, having been a carpenter, and having had some experience in garages and with threshing machines, he had a general knowledge of the use of such tools.

Section 3643, Rev. St. 1913 (Comp. St. 1922, sec. 3025) provides: "In all cases brought under part I of this article it shall not be a defense (a) that the employee was negligent, unless and except it shall also appear that such negligence was wilful, or that the employee was in a state of intoxication; (b) that the injury was caused by the negligence of a fellow employee; (c) that the employee had assumed the risks inherent in, or incidental to, or arising from the failure of the employer to provide and maintain safe premises and suitable appliances, which grounds of defense are hereby abolished, except as provided in the second next following section." The second section thereafter is not applicable under the facts in this case.

Aside from the plea that both parties were under the compensation law at the time of the accident, the defenses pleaded are a denial that defendant was guilty of negligence, and an affirmative plea that plaintiff assumed the risks of the employment. Under the above section, assumption of risk inherent in, or incidental to, the employment, or arising from the failure of the employer to provide suitable appliances, is abolished as a defense. The only question left, as the pleadings now stand, is whether defendant was guilty of negligence, and, if so, the amount of damages plaintiff suffered.

We are unable to say as a matter of law that defendant was not negligent in placing the plaintiff in such a position when the punch was struck by the hammer. This is a matter which a jury must decide upon a consideration of all the evidence furnished by both parties. We express no opinion as to whether defendant

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was negligent, since we have only the testimony on behalf of plaintiff before us.

REVERSED AND REMANDED.

JAMES MURRAY, APPELLEE, v. ROYAL C. BAILEY ET AL.,
APPELLANTS.

FILED APRIL 10, 1923. No. 22228.

1. **Sales:** RESCISSION. Where the purchaser of a farm tractor is induced to buy it by material false representations on which he is entitled to, and does, rely, and is thus defrauded, he may rescind the sale and recover back the purchase price paid.
2. ———: ———: DELAY. Where the purchaser of a farm tractor was fraudulently induced by the seller to buy it and to pay for it without an opportunity to inspect it, mere reasonable delay in returning it, if caused by honest efforts to make it work by trying it before and after replacing defective parts, will not necessarily defeat rescission.
3. ———: ———: RETURN OF PROPERTY. The purchaser of personal property, if induced to buy it by material fraudulent representations and to pay for it without opportunity for inspection, is not necessarily required to return it as a condition of rescission, if he made in good faith an offer to return it and it is shown that it would not be taken back.
4. **Evidence:** ADMISSIBILITY. A reply to a letter received in due course of mail and referred to a third person who answered it, *held* admissible in evidence over the objection of the person by whom it was referred, under the circumstances outlined in the opinion.
5. **Appeal:** HARMLESS ERROR. Harmless error in rulings on evidence and in giving and refusing instructions does not of itself justify the reversal of a judgment.

APPEAL from the district court for Valley county:
BAYARD H. PAINE, JUDGE. *Affirmed.*

Prince & Prince and E. L. Vogeltanz, for appellants.

Davis & Davis and W. C. Heelan, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and DAY,
J.J., TROUP, District Judge.

ROSE, J.

This is an action by the purchaser of a tractor to re-

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cover from the sellers the purchase price paid and other damages on account of false representations inducing the sale. Plaintiff resides on a farm near Seneca. Defendants are dealers in tractors at Ord. The negotiations resulting in the sale were conducted by mail. Before plaintiff had seen the tractor it was delivered to him at Ord on a freight car consigned to Seneca, and it was unloaded by him before he examined it. His claim consists of the following items: Payment by check April 14, 1919, mailed to Ord, \$100; payment by check April 19, 1919, at Seneca, of sight draft attached to bill of lading, being the remainder of the purchase price, \$900; freight, \$47.24; repairs, \$51.05; special damages, \$300; total, \$1,398.29. The petition, liberally construed, states facts sufficient to constitute a cause of action. Defendants denied the fraud charged and pleaded that the tractor was in the condition represented by them when delivered to plaintiff at Ord on the freight car consigned to him at Seneca. Upon a trial of the issues the jury returned a verdict in favor of plaintiff for \$1,000. From a judgment thereon defendants have appealed.

It is argued that the judgment is not sustained by sufficient evidence, that plaintiff failed to prove either a prompt return of the tractor or a rejected offer to return it and that therefore he was not entitled to recover back the purchase price. The letters from defendants to plaintiff contained misrepresentations of material facts. This is shown by testimony of defendants themselves. They wrote letters representing: "We have had this engine on hand for just one year, and have used it for demonstration work and would say it has not plowed ten acres of ground. It is in A No. 1 condition." "Here is a big bargain if taken at once." "We consider this engine as good as new with the exceptions of demonstration work that we have done." "You will find what we have told you is right." The truth is it was a second-hand tractor. Defendants ordered it in 1916. They had it on hand at least two years. In the meantime they sold it to

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a farmer who used it and exposed it to the weather for more than five months and afterward returned it to defendants in exchange for another tractor. There was evidence to sustain findings that it was in poor condition; that the paint was scuffed; that it was an old tractor, that it was out of repair; that parts of the machinery were broken; that it would not work or perform the services for which it was intended; that plaintiff with difficulty drove it to his farm, a distance of five or six miles from the railway station at Seneca; that he demanded instructions for operating this particular make of tractor; that he complained to defendants promptly, bought new parts and tried without success to make the tractor work. There is also proof that the tractor was covered with mud when loaded on the freight car at Ord and that the defects then existed and were not apparent when the tractor was unloaded at Seneca; that plaintiff was required to pay the purchase price and freight before being permitted to make an examination. The evidence is clearly sufficient to justify a rescission on the ground of fraudulent representations.

Did plaintiff lose his right to rescind the sale by failing to act promptly in returning the tractor or in making a rejected offer to return it? He unloaded the tractor April 19, 1919. Thereafter he tried to make it work and requested instructions upon discovering latent defects. He also demanded the replacement of broken parts. As early as May 30, 1919, he wrote, and defendants received, a letter saying:

"I will return your engine and load it on the cars and you refund my money."

In a reply defendant said:

"We do not believe, Mr. Murray, you would be interested in loading that tractor onto the cars, as it would be necessary to establish a fact that the tractor was not fulfilling the manufacturer's guarantee."

This was not the first time defendants had used the words, "would be interested." In reply to a former letter

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they had used that expression in a peremptory refusal to drive the tractor to Merna or Anselmo as a condition of the sale. Under the circumstances plaintiff was justified in assuming, and the jury in finding, that defendants would not have accepted the tractor, if tendered to them at Ord. The evidence seems to be sufficient to sustain a finding that the delay on the part of plaintiff was excusable under the circumstances and that an actual tender of the tractor at Ord would have been unavailing and therefore unnecessary.

The admission in evidence of two letters which plaintiff received by mail from the manufacturer of the tractor is also assigned as error. It is argued that these letters did not come from defendants, that the latter are not bound by them, and that they were admitted without the laying of a proper foundation. From the evidence as a whole the following facts or conclusions are inferable: The letters show that the tractor was sold by the manufacturer in 1916, through the agency of defendants, to a farmer residing near Ord. This, in connection with other evidence, disproves the representation by defendants that they had the tractor on hand just one year for demonstration work. Plaintiff received the first of these two letters in due course of mail in reply to a letter mailed by him to defendants, complaining about the tractor and requesting supplies to replace broken parts. The second letter to which objection was made was likewise received by plaintiff in reply to a letter on the same subject, which had been mailed by him to the manufacturer in response to the first of the two letters. Defendants referred the subject-matter of the correspondence to the manufacturer and took the initiative in prompting the letters from that source. The evidential facts shown by these letters, to which objections were made, were proved outside of the letters. The genuineness of the letters is not disputed. If the foundation was not properly laid in the first instance, it was supplied by subsequent testimony. The circumstances dis-

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closed by the evidence as a whole show that there was no prejudicial error in the rulings of the trial court.

With the principal questions determined in favor of plaintiff, no prejudicial error has been found in other rulings on evidence or in the giving or refusing of instructions.

AFFIRMED.

WILLIAM G. GARRETT V. STATE OF NEBRASKA.

FILED APRIL 10, 1923. No. 23124.

1. **Homicide: INTENT.** Intent is an essential element of the crime of assault with intent to commit murder and proof of such intent is indispensable to support a conviction.
2. ———: **INSUFFICIENCY OF EVIDENCE.** The record examined, and, *held*, that there is no proof to show that defendant committed either of the offenses with which he is charged in the information.

ERROR to the district court for Kearney county:
WILLIAM A. DILWORTH, JUDGE. *Reversed.*

Bruckman & Paulson, for plaintiff in error.

O. S. Spillman, Attorney General, and *George W. Ayres*, *contra*.

Heard before MORRISSEY, C. J., LETTON, DEAN and DAY, JJ., BUTTON, District Judge.

DEAN, J.

Defendant was informed against in Kearney county and charged, in the first count of the information, with having maliciously and feloniously made an assault upon Hannah C. Garrett, his wife, with a double-barreled shotgun, with intent to kill and murder her. In the second count he was charged with having made an assault upon her with intent to inflict great bodily injury. Defendant was found guilty and was sentenced to serve 5 years in the penitentiary. He prosecutes error.

Defendant is a tenant farmer residing on a farm about five miles from Minden. April 12, 1922, the sheriff called at his home twice to serve certain writs on him,

namely, one in a suit brought by his wife for a divorce, the other was a writ of habeas corpus under which it was sought to deprive him of the custody of his six minor children ranging from five to seventeen years of age. It appears that while the sheriff was at his place defendant had a loaded shotgun under his arm and that he was much excited and greatly disturbed over the misfortunes that had overtaken him and his household.

Defendant indulged in a good deal of boisterous and ill-timed talk about shooting, before the sheriff left the premises, and made threats that might have justified a prosecution for a misdemeanor under section 9554, Comp. St. 1922, which provides for the punishment of one who "threatens another in a menacing manner." But whether defendant threatened his wife or threatened the sheriff, who was present throughout the verbal eruption, that officer testified that he did not know from anything that he said. His wife, however, testified that he threatened to shoot her and then to shoot himself and that he said that if he could not have her nobody else could have her, and that if he could not have the children she could not have them. It also appears that defendant and his wife talked together about a reconciliation soon after the threats were made.

The information was drawn under sections 9553 and 9556, Comp. St. 1922. Section 9553 provides: "Whoever shall maliciously shoot, stab, cut, or shoot at, any other person with intent to kill, wound, or maim such person, shall be imprisoned in the penitentiary, not more than twenty years nor less than one year." Section 9556 provides: "Whoever assaults another with intent to inflict a great bodily injury, shall be punished, on conviction thereof, by imprisonment in the penitentiary for not less than one year nor more than five years."

Notwithstanding defendant's extravagant talk, the proof fails to show that he committed either of the offenses with which he is charged in the information. That

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he is entitled to a fair and impartial trial goes without saying. With respect to the gun maneuver, the sheriff testified that it was all over in 30 seconds, and that while defendant held the shotgun he, the sheriff, held the gun-barrel, and it was shown that defendant whether under direction of the sheriff or of his own volition does not clearly appear from the sheriff's evidence, pulled the triggers and discharged the contents of the gun into the ground. On this point defendant testified that the sheriff held the gun-barrel when it was pointed down and told him to pull both triggers. He said he did as requested and the contents of the gun were discharged. It is not shown that defendant at any time pointed the gun at any person, nor that he assaulted any person, nor that he made any attempt to inflict bodily injury upon any person. In this connection it may be added that five character witnesses testified that defendant's reputation, as a peaceable citizen, was good in his home community and their testimony was not contradicted by the state. *McDougal v. State*, 105 Neb. 553, and cases there cited.

That defendant talked much and unwisely abundantly appears and that is about all the record discloses with respect to his conduct. The law is that intent is an essential element of the crime of assault with intent to commit murder and proof of such intent is indispensable to support a conviction. *Botsch v. State*, 43 Neb. 501.

Defendant points out 55 alleged assignments of error. Of these 22 have to do with instructions given by the court and 18 point out alleged error in the refusal to give instructions tendered by defendant. The remainder are concerned for the most part with the assignments which are discussed in the opinion. In view of our conclusion we do not find it necessary to discuss the assignments in respect of the instructions.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

Feuerstein v. Saunders County.

W. W. FEUERSTEIN ET AL., APPELLANTS, V. SAUNDERS
COUNTY ET AL., APPELLEES.

FILED APRIL 10, 1923. No. 22320.

Highways: VACATION. Where a petition praying that a part of a road be vacated, signed by ten or more electors residing within five miles of such road, as provided in section 2566, Comp. St. 1922, is filed with the clerk of the board of county commissioners, and due notice thereof is given as required by law, and where objections are filed to the vacation of such road, an order of the county board granting the petition will be held to be erroneous as having been made without jurisdiction, where the proceedings of the board fail to show that a majority of the electors residing within two miles of the road sought to be vacated, and not residing within a village or city, have consented thereto, as provided by section 2565, Comp. St. 1922.

APPEAL from the district court for Saunders county:
EDWARD E. GOOD, JUDGE. *Affirmed in part, and reversed in part.*

J. H. Barry, for appellants.

H. A. Bryant and *Ernest S. Schiefelbein*, *contra*.

Heard before MORRISSEY, C. J., ALDRICH and DAY, JJ.,
BEGLEY and BUTTON, District Judges.

DAY, J.

This is an appeal by W. W. Feuerstein and 14 others from a judgment of the district court for Saunders county, affirming an order of the board of county commissioners of that county establishing a public road, and also vacating a part of the road previously established.

No complaint is made of the judgment in so far as it affirms the order of the board establishing the new road. Appellants object only to that part of the judgment which affirms the order of the board vacating a part of the old road, and urge upon us that, inasmuch as the record of the proceedings before the board fails to show that a majority of the electors residing within two miles of the road sought to be vacated, and not living within a village or city, have consented to the vacation of the

road, therefore the board was without power to order a part of the road vacated.

It appears that on April 25, 1919, a petition bearing the signatures of 42 electors was filed with the clerk of the board, praying that a road specifically described by metes and bounds be established, and also praying that a part of the road theretofore existing be vacated. A few days later a supplemental petition was filed, signed by 34 additional electors, praying for the same relief. To each of these petitions an affidavit was attached to the effect that the signers were electors of the county residing within five miles of the proposed road. Later 13 of the petitioners asked that their names be withdrawn from the petition, and still later 50 electors filed objections to the vacation of the road.

The change sought to be effected by the petitions was to have the road extend along straight lines. The old road, from a given point, extended north 495 feet, at which point it veered to the left on an angle of 18 degrees and 2 minutes for a distance of about 867 feet, where it intersected the east and west section line road. The petitioners sought to have the road extend from the same given point directly north to the section line road, and also to have such parts of the old road vacated as lay outside the lines of the new road. A commissioner was duly appointed to view the proposed road, who recommended some slight changes. A notice was duly published, and a date set for hearing objections. W. W. Feuerstein and 14 others, the appellants, residing within 2 miles of the road, and not living within any village or city, filed a protest to the vacation of any part of the road. Upon the hearing the board made an order establishing a new road, and vacating the part of the old road, as prayed in the petition. From this order the protestants, appellants herein, took error to the district court, where the order of the board was sustained.

It is conceded by the appellants that the record of the proceedings before the board is sufficient to authorize

the board to establish a new road, but it is earnestly insisted that the recitals contained in the record are insufficient to show jurisdiction of the board to vacate the old road.

The question presented turns upon the construction to be given to section 2565, Comp. St. 1922, when considered in connection with section 2566. As originally enacted section 2565 was as follows: "All roads within this state which have * * * not been vacated in pursuance of law are hereby declared to be public roads." In 1909 (Laws 1909, ch. 113), and again in 1917, this section was amended by adding the words, "and no such road or any part thereof shall be vacated or changed without the consent of the majority of the voters living within two miles of the road and not living in a village or city." Laws 1917, ch. 58. Section 2566 provides as follows: "Any person desiring the establishment, vacation, or alteration of a public road, shall file in the clerk's office of the proper county a petition signed by at least ten electors residing within five miles of the road proposed to be established or vacated, in substance as follows: (here follows a form of petition)."

It has repeatedly been held that the filing of a petition in accordance with the provisions of section 2566, Comp. St. 1922, and the giving of notice as contemplated by section 2578, are conditions precedent to the making of an order by the county board affecting public roads. *State v. Otoe County*, 6 Neb. 129; *Doody v. Vaughn*, 7 Neb. 28; *Beatty v. Beethe*, 23 Neb. 210; *Lesieur v. Custer County*, 61 Neb. 612. Under these decisions it is held that the board has jurisdiction to establish or vacate a public road, when a petition is filed signed by at least ten electors residing within five miles of the road proposed to be established or vacated, and after proper notice has been given. These decisions, however, were made before section 2565, Comp. St. 1922, was amended by the laws of 1909 and 1917, in the manner hereinbefore pointed out. What effect, then, should be given to

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the added words, "and no such road or any part thereof shall be vacated or changed without the consent of the majority of the voters living within two miles of the road and not living in a village or city?" A fair construction of this language would seem to indicate that it was intended as a limitation upon the power of the board, where the purpose of the proceeding was to vacate or change a public road. A board of county commissioners is a tribunal of limited jurisdiction, which is defined by statute, and it is essential that all the facts necessary under the statute to authorize its action in any given case should be affirmatively shown. *Robinson v. Mathwick*, 5 Neb. 252. Construing sections 2565 and 2566, Comp. St. 1922, together, as we must do, because *in pari materia*, it would seem that, where it is sought to vacate or change a road, or any part thereof, in addition to the requirements of sections 2566 and 2578, Comp. St. 1922, the record of the proceedings before the board must somewhere affirmatively show that a majority of the electors residing within two miles of the road, and not living in a village or city, consented thereto. Nowhere in the record does it appear that a majority of the voters residing within two miles of the road, and not living within a village or city, consented to the vacation of the road in question. On the face of the record, that part of the order of the county board vacating a part of the road is erroneous because it fails to show jurisdictional facts.

We conclude, therefore, that the judgment of the district court, in so far as it sustains the order of the county board establishing a new road, should be affirmed; and that the judgment affirming that part of the order vacating a part of the old road should be reversed; and the cause is remanded to the district court to enter judgment in accordance with the views herein expressed.

AFFIRMED IN PART, AND REVERSED IN PART.

Haffke v. Missouri P. R. Corporation.

FRED C. HAFFKE, APPELLANT, v. MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA, APPELLEE.

FILED APRIL 10, 1923. No. 22324.

1. **Railroads: CROSSINGS: DUTY OF TRAVELER.** "It is the duty of a traveler on a highway, when approaching a railroad crossing, to look and listen for the approach of trains. He must look, where, by looking, he could see, and listen, where, by listening, he could hear; and if he fails without reasonable excuse to exercise such precautions he is guilty of negligence." *Askey v. Chicago, B. & Q. R. Co.*, 101 Neb. 266.
2. ———: **NEGLIGENCE OF TRAVELER.** Under the facts disclosed by the record, and set out in the opinion, *held*, that the negligence of the plaintiff was more than slight, as compared with the negligence of the defendant, and precludes plaintiff from a recovery.
3. **Negligence: COMPARATIVE NEGLIGENCE: QUESTION FOR COURT.** Where the facts show beyond reasonable dispute that the plaintiff's negligence was more than slight, as compared with the negligence of the defendant, it is the province of the court to direct a verdict for the defendant.

APPEAL from the district court for Lancaster county:
WILLIAM M. MORNING, JUDGE. *Affirmed.*

H. S. Lower and Wilmer B. Comstock, for appellant.

J. A. C. Kennedy, Yale C. Holland and George L. DeLacy, *contra*.

Heard before **MORRISSEY, C. J., LETTON, ROSE and DAY, JJ.**

DAY, J.

This action was brought by Fred C. Haffke to recover damages for personal injuries sustained in a collision between his automobile truck and one of defendant's trains at a railroad crossing. The plaintiff claims that the collision and consequent injuries were due to the defendant's negligence. At the conclusion of the plaintiff's testimony the trial court, on motion of the defendant, directed the jury to return a verdict in favor of the defendant, which was accordingly done. Thereupon judgment was entered in favor of the defendant. Plaintiff appeals.

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The error complained of by the plaintiff is the failure of the court to submit the question of negligence and contributory negligence to the jury. It appears from the record that about 9 a. m. on April 14, 1920, the plaintiff was driving his Reo automobile truck loaded with cattle, en route from Plattsmouth to Omaha, Nebraska. A short distance from where the collision occurred the highway passes over the Pappio creek bridge, and then rises gradually up to the railroad crossing some 34 yards from the east end of the bridge, the elevation at the crossing being about 6 feet above the roadway at the bridge. The bridge was about 34 yards in length. At any point from the east end of the bridge to the crossing a person traveling along the highway could see plainly down the track in the direction from which the train approached as far as the whistling post. The distance from the crossing to the whistling post is estimated by the plaintiff at 600 feet, by one of his witnesses at 1200 feet, and it is alleged in the petition that it is about 1000 feet. Just as the plaintiff drove off the east end of the bridge he looked in both directions, but saw no train. He then proceeded to approach the railroad crossing driving his truck in low gear at a speed of about two miles an hour. After leaving the bridge he did not look again for approaching trains, but listened as best he could, the noise of his machine and the wind interfering somewhat with his ability to hear. In this manner he drove upon the track when the train was about 30 yards distant, and coming toward him at a speed of about 50 miles an hour. The train collided with the truck, demolishing it, and the plaintiff sustained severe personal injuries; both of his legs were broken, and he was bruised in several places about the head and body.

We think it may well be conceded that the evidence with respect to the negligence of the defendant is sufficient to have that issue submitted to the jury, but the question upon which the case must turn is whether the plaintiff was guilty of such contributory negligence

as to defeat a recovery. Assuming that the plaintiff is correct in his estimate that an approaching train could be seen for the first time when within 600 feet of the crossing by a person traveling upon the highway between the bridge and the railroad track, that the train was running at 50 miles an hour, and that he was driving his truck at two miles an hour, it would follow that the plaintiff would be at a point about 24 feet from the crossing at the earliest possible moment it was possible for him to have seen the approaching train. To cover this distance would require about 8 1-3 seconds for both the train and the plaintiff's truck. Plaintiff concedes that, had he looked at any time while covering this distance of 24 feet, he could have seen the train. He also testified that he could have stopped his truck within a distance of one foot.

Was the failure of the plaintiff to look for an approaching train while passing over this distance such contributory negligence as to defeat a recovery? The rule is now fairly well settled in this state that it is the duty of a traveler on a highway, when approaching a railroad crossing, to look and listen for approaching trains. He must look, where, by looking, he could see, and listen, where, by listening, he could hear, and if he fails without reasonable excuse to exercise such precautions, no recovery can be had arising out of a collision with a passing train. *Rickert v. Union P. R. Co.*, 100 Neb. 304; *Askey v. Chicago, B. & Q. R. Co.*, 101 Neb. 266; *Seiffert v. Hines*, 108 Neb. 62.

The plaintiff seeks to excuse his failure to look for an approaching train while traveling this distance of 24 feet by showing that the road was in bad condition; that it was soft; that there were some ruts almost axle deep; and that it was necessary that his whole attention be centered upon driving his machine. We do not consider, however, that the circumstances were such as to excuse him from looking. A mere glance occupying but a fraction of a second would have sufficed to warn him

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of the approaching train.

The plaintiff also contends that under our comparative negligence statute (Comp. St. 1922, sec. 8834) the question of negligence and contributory negligence should have been submitted to the jury. In *Disher v. Chicago, R. I. & P. R. Co.*, 93 Neb. 224, it was held: "Where the facts in evidence tend to show both negligence and contributory negligence, the duty to make the comparison required by the statute rests with the jury, unless the evidence as to negligence is legally insufficient, or contributory negligence is so clearly shown that it would be the duty of the trial court to set aside a verdict in favor of the plaintiff. Ordinarily, wherever there is room for difference of opinion upon these questions, they must be submitted to the jury." In *Morrison v. Scotts Bluff County*, 104 Neb. 254, it was held that, if in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any degree that which under the circumstances amounts to slight negligence, the contributory negligence of the plaintiff will defeat a recovery. In *Dodds v. Omaha & C. B. Street R. Co.*, 104 Neb. 692, it was held: "In an action for damages caused by the alleged negligence of the defendant, where it is shown beyond reasonable dispute that the plaintiff's negligence is more than slight as compared with that of the defendant, the case should not be submitted to the jury, and it is the duty of the court to enter judgment of dismissal." See *Frye v. Omaha & C. B. Street R. Co.*, 106 Neb. 333; *Bauer & Johnson Co. v. National Roofing Co.*, 107 Neb. 831.

Considering all of the circumstances surrounding this accident, we conclude that reasonable minds could come to no other conclusion than that plaintiff was guilty of more than slight negligence in comparison with the negligence of the defendant, and that the court was right in directing a verdict for defendant.

AFFIRMED.

Katlman v. Leon's, Inc.

MAX KATLEMAN, APPELLEE, V. LEON'S, INC., APPELLANT.

FILED APRIL 10, 1923. NO. 22282.

Corporations: BREACH OF CONTRACT: MEASURE OF DAMAGES. In an action to recover damages for breach of a contract to issue and deliver corporate stock, the measure of recovery is the value of the stock at the time of the breach.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Reversed, with directions.*

Peterson & Devoc, Lambert, Shotwell & Shotwell and Arthur Rosenblum, for appellant.

T. S. Allen and Reese & Stout, contra.

Heard before LETTON, ROSE, DAY and GOOD, JJ.

GOOD, J.

Plaintiff brought this action against the defendant to recover damages for breach of contract. Two causes of action were pleaded. For his first cause of action, plaintiff alleged that he had an oral agreement with the Benway Furniture Company, whereby the said company had agreed to lease to him, for a period of ten years, space for a storeroom at 1039 O street, in the city of Lincoln; that, with the consent of said company and before said lease was reduced to writing, he assigned and transferred the same to the defendant, and that the said Benway Furniture Company, in pursuance of said assignment, executed the lease to the defendant; that, in consideration of said assignment of lease or agreement to lease by plaintiff to defendant, it was to open and operate on the leased premises a store for the sale of men's hats and furnishings, and was to deliver to plaintiff, when the store was opened, \$5,000 of the par value of the corporate stock of the defendant company, and was to employ plaintiff as manager of said store at a salary of \$175 a month. He alleged the opening of the store on April 18, 1919, the refusal and failure of defendant to transfer the corporate stock, and that its value was \$7,000. For his second cause of action, plaintiff alleged that he acted as manager of defendant's store from

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the 18th of April, 1919, to the 31st of August, 1919; that defendant had paid to him on his salary the sum of \$753.50, and that there was still due and unpaid on salary the sum of \$205.50.

The defendant admitted that it leased the premises from the Benway Furniture Company for a period of ten years, but denied that any lease, or agreement for a lease, was ever assigned or transferred by plaintiff to defendant, or that plaintiff ever had any lease or agreement for a lease to the demised premises, or that it had agreed to issue any of its corporate stock to plaintiff. Defendant admitted the employment of plaintiff as manager of the store and admitted that it had paid him the sum alleged by him, but denied any agreement to pay him \$175 a month, and that anything was due the plaintiff.

Plaintiff in his reply alleged that defendant received the lease from the Benway Furniture Company, pursuant to the agreement with plaintiff, and retained the same, and that the value of said lease was \$15,000, and denied all other allegations in the answer.

The trial resulted in a verdict for plaintiff in the sum of \$5,721.10 on the first cause of action, and \$205.50 on the second cause of action, making a total of \$5,926.60. Judgment was entered on the verdict, and defendant has appealed.

Defendant asserts that the evidence is insufficient to establish any consideration for the alleged contract between plaintiff and defendant, wherein it is charged that defendant was to issue to plaintiff stock in the defendant corporation of the par value of \$5,000, and that the evidence does not sustain the verdict of the jury on the first cause of action. The record discloses that about the middle of February, 1919, plaintiff began negotiations with the Benway Furniture Company, with a view to leasing floor space at 1039 O street for a storeroom. Plaintiff was informed by Mr. Lloyd, manager for the Benway Company, that it had space for

rent and would be willing to lease upon certain requirements, among which were that the character of the business to be operated must be a line which would not conflict with any line that was sold by the Benway Company, and that he would also have to be satisfied as to the financial responsibility of the person or persons to whom lease was made, and, if the lessees were not financially responsible personally, that he would expect a bond to be given for the payment of the rent, or the signature of some person on the lease who was financially responsible and acceptable.

It appears that plaintiff had not sufficient capital to open and operate the proposed store alone, but he told Mr. Lloyd that he expected to interest some relatives with him, and from whom he expected financial backing. He also mentioned the name of a brother-in-law, whom he might procure as surety, and requested Mr. Lloyd to hold the matter open until the following Friday, which would be the 21st of February. Mr. Lloyd informed plaintiff that other persons were negotiating for the floor space, but that he would hold the matter open until the following Friday. The plaintiff did not again see Mr. Lloyd, of the Benway Furniture Company, until after that time. In the meantime plaintiff had seen his relatives and was not able to interest them with him in the business. On Saturday, the 22d of February, plaintiff called up Sam J. Leon, of Omaha, who was an officer and stockholder of the defendant, and talked with him concerning the establishment of a store for the sale of men's hats and furnishings in Lincoln, and at his solicitation Mr. Leon, together with his brother, Mark, came to Lincoln on Sunday, the 23d of February, and they had a conference at that time with the plaintiff. Plaintiff says that he informed them of the floor space that could be leased, being 11 feet by 50 feet, for \$125 a month, and that possibly a wider space could be had and perhaps a longer time than five years might be obtained. He suggested to the Leons that they go into

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partnership with him, and that they open up a store together. He testifies that they refused to entertain the partnership idea, but said that, if the location was desirable, they would rent it, open a store and put him in as manager, and would issue to him \$5,000 of the capital stock of the defendant corporation. The Leons testify that they declined the partnership proposal, but told plaintiff, if the location was satisfactory, they would lease it, open a store, and give him a position as manager, and they state that plaintiff assented to this. Plaintiff then called Mr. Lloyd on the telephone and arranged for a conference between the four for that afternoon. The record discloses that the location was examined and the two Leons and the plaintiff, together with Mr. Lloyd, discussed the matter; that Mr. Lloyd informed the plaintiff that he had not come back by Friday as he had agreed to do, and that he was negotiating with other persons for the lease of the premises. The conference finally resulted in an agreement that defendant would lease a space 18 feet wide by 51 feet long, including corresponding basement underneath, for ten years at a rental of \$250 a month. During these negotiations Mr. Lloyd inquired of the plaintiff what his status was to be, and one of the Leons spoke up and said that plaintiff was to be in charge of the store as manager. The lease was subsequently reduced to writing and was signed by the parties thereto March 4, 1919. This, in brief, states the facts concerning the alleged lease or agreement for lease between the plaintiff and defendant.

From the record it does not appear that any definite arrangement had ever been reached between plaintiff and the Benway Company for a lease, nothing but a tentative proposition, on the one side, which had never been accepted by the other. The minds of the two parties never met. It follows that plaintiff had nothing which he could assign or transfer to the defendant. There was no consideration for the contract between plaintiff and defendant, if made as contended by plaintiff. If this

action, instead of being one to recover for the agreed price of the assignment of a lease or contract for a lease, had been one for the recovery of compensation for services rendered in procuring a lease from the Benway Company to defendant, a different situation would be presented.

There is another reason why plaintiff was not entitled to recover upon the first cause of action. It is a well-settled rule of law that the measure of recovery in an action for damages for failure to issue and deliver corporate stock is the value of the stock at the time of the breach. *Winside State Bank v. Lound*, 52 Neb. 469; *Pinkerton v. Manchester & L. R. Co.*, 42 N. H. 424; *Beaty v. Johnston*, 66 Ark. 529; *Roder v Niles*, 61 Ind. App. 4; *Belden v. Krom*, 34 Wash. 184.

The alleged contract provided that the stock should be issued when the store was opened for business. The record shows that the store was opened on the 18th day of April, 1919, and if the contract was entered into, as contended by plaintiff, this would be the date when he was entitled to have the stock issued and delivered to him, and the breach of the contract must have occurred at that time. The measure of recovery would have been the value of the stock on that date. There is no evidence in the record of the value of the stock at that time, and the only evidence of the value of the stock at any time is the testimony of plaintiff. He testified that, at the conference in Lincoln on February 23, Mark Leon said the stock was worth \$100 a share.

For the reasons given, the district court should have sustained defendant's motion to direct a verdict for it on the first cause of action, because the evidence is insufficient to sustain a verdict for plaintiff on that cause of action. There are numerous other assignments of error, but we deem it unnecessary to consider them in this opinion, as we think they are not likely to occur upon a subsequent trial of the case.

Defendant makes no complaint against the verdict

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upon the second cause of action. The judgment entered below was one in gross for the amount of the recovery allowed on the two causes of action.

The judgment of the district court is reversed and the cause remanded, with directions to the district court to enter judgment for plaintiff on the second cause of action in the sum of \$205.50, and awarding the defendant a new trial upon the first cause of action.

REVERSED.

H. W. J. EDBROOKE, APPELLEE, V. FIRST NATIONAL BANK
OF ALLIANCE, APPELLANT.

FILED APRIL 10, 1923. No. 22319.

1. **Appeal:** CONFLICTING EVIDENCE. The verdict of a jury in a law action, based on conflicting evidence will not be disturbed, unless clearly wrong.
2. ———: HARMLESS ERROR. It is not prejudicial error for the court, by an instruction, to withdraw an item of a counterclaim from the consideration of the jury, where the jury have properly determined that no right of counterclaim existed.
3. ———: ADMISSIBILITY OF EVIDENCE. A party who procures a witness to read in evidence the contents of a written instrument cannot complain of the subsequent admission in evidence of the identical instrument.

APPEAL from the district court for Box Butte county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Burton & Reddish, for appellant.

Warren & Hodgkin and *E. C. Barker*, *contra*.

Heard before MORRISSEY, C. J., ALDRICH and GOON, JJ.,
BEGLEY and BUTTON, District Judges.

GOOD, J.

This action was brought by plaintiff to recover a balance due for services as an architect in preparing plans and specifications for the remodeling of defendant's bank building, pursuant to a written contract between the parties. The defendant admitted the making of the contract, but alleged in its answer that it was under-

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stood and agreed between the parties that the cost of the entire work, including the services of the architect, should not exceed \$30,000, and alleged that, under the plans and specifications furnished, the total cost of remodeling the bank building would exceed \$60,000, and that it could not and did not use the plans and specifications, and denied any liability on the contract. It further alleged, by way of counterclaim, that it had made a partial payment on the contract, and had ordered and paid for certain material for the building before it was aware that the cost of the remodeling would exceed the sum of \$30,000, and that the material ordered was of such a character that it could not be used for any other purpose and was an entire loss to the defendant; and asked for judgment for the amount of the partial payments made and the cost of the material paid for. Plaintiff denied that there was any agreement to limit the cost of remodeling to \$30,000. Trial was had to the court and jury, and the jury found for plaintiff in the total amount claimed by him. Defendant brings the case to this court for review.

1. It is evident from an examination of the record that the principal question, and the one which is determinative of this case, is whether or not there was an agreement between the parties that the cost of remodeling the building should not exceed \$30,000. On this question the evidence was in conflict. Plaintiff testified that there was no such cost limit, while the defendant and several other witnesses testified that there was such a limitation. There is evidence in the record which tends to show that defendant knew that the cost of remodeling would exceed \$35,000, and that after receiving this information it made a partial payment to the plaintiff for his services, and that the president of defendant gave other reasons for not proceeding with the work of remodeling the building. The record clearly shows that there was ample evidence to sustain a finding, in favor of plaintiff, that there was no such

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limit to the cost of the remodeling, as claimed by defendant. This question was fairly submitted to the jury, and their finding is conclusive. This court will not disturb the verdict of a jury based on conflicting evidence, unless clearly wrong. *Blado v. Draper*, 89 Neb. 787; *Albrecht v. Morris*, 91 Neb. 442; *Young v. Kinney*, 85 Neb. 131.

It is evident that defendant could not be entitled to recover anything upon its counterclaim, unless there was a limitation upon the cost of the remodeling of the building. The finding of the jury for plaintiff disposed of defendant's right to recover on its counterclaim.

2. Defendant also complains of the giving of an instruction by the court which withdrew from the jury one item of the counterclaim. Since the finding of the jury disposed of any right of defendant to recover, it was not prejudicial to withdraw from the jury one of the items of the counterclaim.

3. Defendant complains of the admission in evidence of a certain written instrument. Prior to its admission, it was produced by the defendant and submitted to plaintiff, who was then on the witness-stand, with the request that he read it. The contents of the instrument were read in evidence by the witness, and the instrument was subsequently offered and received in evidence over defendant's objection. Defendant was instrumental in placing the contents of the instrument before the jury. A party who procures a witness to read in evidence the contents of a written instrument cannot complain of the subsequent admission in evidence of the identical instrument. *Robinson v. City of Omaha*, 84 Neb. 642; *Larson v. Chicago & N. W. R. Co.*, 89 Neb. 247.

There is no prejudicial error in the record, and the judgment is

AFFIRMED.

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WALTER MCKEE, APPELLEE, v. NEBRASKA GAS & ELECTRIC
COMPANY ET AL., APPELLANTS.

FILED APRIL 10, 1923. No. 22072.

1. **Waters:** DIVERSION: LIABILITY. Where the owner of a milldam wilfully diverts the water of a natural stream into a millrace cut through his own land and thereafter turns it back into the natural channel at right angles, so that the water is carried by its own momentum across the natural channel onto the land of the opposite riparian owner, he is liable for the damages resulting therefrom.
2. ———: ———: ———. A riparian owner, who by his wilful act diverts the waters of a natural stream from its accustomed channel and causes them to flow upon the lands of his neighbor, is liable for the resulting damages, irrespective of any question of negligence or malice. It is sufficient in such case if plaintiff prove that the act was wrongfully done and that he was damaged thereby.
3. ———: ———: ———. The fact that defendant may in good faith have believed that it was necessary for the preservation of its own property to cut a dike and change the course of a natural stream is no defense to an action for damages where the effect of its act was to injure the lands of plaintiff, a lower riparian owner.

APPEAL from the district court for Nance county:

A. M. POST, JUDGE. *Affirmed.**J. W. Rice and Rose & Doyle, for appellants.**N. D. Burch and G. N. Anderson, contra.*Heard before MORRISSEY, C. J., ALDRICH and GOOD, JJ.,
BEGLEY and BUTTON, District Judges.

BEGLEY, District Judge.

Action by plaintiff to recover damages on account of the wrongful act of defendant in diverting the waters of the Cedar river from its former channel onto and over plaintiff's land. Plaintiff prevailed, and defendant appeals.

Defendant owns and operates an electric light plant at Fullerton, Nebraska, and, prior to the acts complained of by the plaintiff, part of the power used for supplying electricity was obtained from the Cedar river by means of an ordinary dam and turbine wheel. In its natural

course the Cedar river comes down from the northwest to near the north line of the town of Fullerton. It then describes a sweeping loop to the north and, making a horseshoe bend, flows back directly south for over one-half a mile, passing the northeast corner of the town and veering to the southeast toward the Loup river. The property of the defendant is located within the peninsula formed by the north bend of the river, it being about three-fourths of a mile around the loop and about one-fourth of a mile across the neck. Defendant maintained a dam across the river near the point where it begins its swing to the north, and a millrace has been cut across the intervening neck of land from the dam to connect with the river on the east at a point directly opposite the northwest corner of plaintiff's land, which lies on the east side of the river at this point. The water from this millrace is used to operate the wheel in connection with the power plant of the defendant. The flume, wheel-house and wheels are located on this millrace about 150 feet west of plaintiff's land, and the power-plant is located about 30 feet south of the flume.

In September, 1919, the water being somewhat above its natural stage and under the pressure, the water began to escape from the south of the flume and between it and the dike. This endangered the power-plant and threatened its destruction. The defendant, through its employees, Greer and others, began combatting the escape of the waters, and being unable to do so, in order to save their own property from destruction decided to open a part of the restraining dike on the north side and permit the waters to escape on that side. A small channel was cut on the north side of the dike permitting the waters to escape, and in a very few hours this so enlarged that a channel had been cut 30 or 40 feet wide on that side, and the river had forsaken its old channel around the loop and flowed directly through the millrace and entered the river again at right angles at a point near the northwest corner of plaintiff's land.

Plaintiff, as owner of $7\frac{1}{2}$ acres of land bordering on the east side of the river and opposite where the millrace connected with it, brought this action alleging that, by reason of the defendant's wrongful act in turning the channel through the millrace instead of permitting same to go around the bend, sand-bars were formed in the old channel of the river to the northwest of plaintiff's land, thereby obstructing the flow of waters therein in flood time, and that thereafter on three different occasions, in 1920, heavy rains caused the Cedar river to rise to flood stage, and that by reason thereof the lands of plaintiff were flooded and damaged, his crops were destroyed and live stock drowned. This was denied by defendant.

The case was tried to a jury, and the court instructed the jury that it was undisputed that the defendant Greer by direction of his codefendant cut or opened the bank or dike at the lower end of the millrace, thereby diverting the water of said stream from its natural channel onto and over the plaintiff's land, and that such was a wrongful act for which the plaintiff was entitled to recover at least nominal damages. Defendant alleges that this was error, and that the defendant was entitled to have two questions submitted to the jury, viz: (1) Was plaintiff's injury caused by the action of defendant? (2) Was such action negligent?

The evidence shows that defendant changed the course of the river, greatly shortening it; that the bend of the river was thereafter filled up to nearly a level with the banks as they formerly existed; that the bed of the river below was filled to a depth of from two to four feet; that plaintiff's land had not been subject to overflow before, but that the first flood of the river thereafter his land was overflowed, and this was repeated at each subsequent rise of the river, although the river did not leave its banks at other points. Some effort was made by defendant to show that there had been some change in the grades of the streets of Fullerton, and in the railroad

bridge and embankments, which might have caused the overflow, but these changes were shown to have been made more than four years prior to defendant's acts, and, although the river had been as high as in 1920, no overflow had occurred on plaintiff's land. The only overflows that did occur were caused by the breaking of a dam at Erickson several years ago. Defendant changed the course of the river in such manner that, whereas it formerly flowed past plaintiff's land from north to south, when changed, it flowed east and west directly against plaintiff's west bank and at right angles thereto, the course of the stream was greatly shortened, thereby accelerating the flow of the water, and the undisputed evidence shows this caused the banks to wash away and the land to overflow. The court was therefore right in instructing the jury that the act of the defendant caused the damage, if any.

Appellant contends that there can be no recovery without first showing that the act of defendant was negligent, and that it was error for the court not to submit that question to the jury, and has cited cases holding that, where a dam is constructed by proper authority, the owner is not liable for damages caused by breakage thereof or seepage therefrom, unless it is proved that the dam has been negligently constructed or maintained. This rule may be conceded. However, this is not a case based on any negligent act of construction or maintenance of defendant's dam, but is one based on the wilful, wrongful act of defendant in cutting the dike and thereby changing the channel of the river and discharging a large volume of water into the river at right angles to plaintiff's land. The cutting of the dike and the changing of the river was the wrongful act, something defendant had no legal right to do, and no matter how skilfully it was done or what degree of care was used in the operation, or that defendant in good faith believed the act necessary for the preservation of its own property, it cannot be urged in defense of this action. It

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is sufficient if plaintiff prove that the act was wrongfully done and that he was damaged thereby. "Irrespective of any question of negligence or malice, a riparian owner who, by his wilful act, diverts the waters of a natural stream from its accustomed channel, and causes them to flow upon the lands of his neighbor, is liable for the resulting damages." 27 R. C. L. 1094, 1096, sec. 32. *See Hartshorn v. Chaddock*, 135 N. Y. 116; *McKee v. Delaware & Hudson Canal Co.*, 125 N. Y. 353; *Southern R. Co. v. Lewis*, 165 Ala. 555; *Kane v. Bowden*, 85 Neb. 347; *Kay v. Kirk*, 76 Md. 41, 35 Am. St. Rep. 408; *Hulme v. Shreve*, 4 N. J. Eq. 116; *Valley R. Co. v. Franz*, 43 Ohio St. 623; *Briscoe v. Young*, 131 N. Car. 386.

Complaint is made as to the excessiveness of the recovery. The evidence of damages all comes from the plaintiff's witnesses, and was not controverted by defendant in the lower court. The amount found by the jury is within the range of the testimony.

No error being found in the record, the judgment is
AFFIRMED.

WILLIAM O. JARMAN, APPELLEE, v. NEBRASKA GAS &
ELECTRIC COMPANY, APPELLANT.

FILED APRIL 10, 1923. No. 22315.

1. **Case Followed.** This case is ruled by the law as stated in *McKee v. Nebraska Gas & Electric Co.*, *ante*, p. 137.
2. **Instructions** examined and approved.

APPEAL from the district court for Nance county:
A. M. POST, JUDGE. *Affirmed.*

J. W. Rice and C. H. Kelsey, for appellant.

N. D. Burch and G. N. Anderson, *contra*.

Heard before MORRISSEY, C. J., ALDRICH and GOOD,
J.J., BEGLEY and BUTTON, District Judges.

BEGLEY, District Judge.

This is a companion case to *McKee v. Nebraska Gas & Electric Co.*, *ante*, p. 137. Both actions arise from the

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same set of facts and counsel in both are identical, and therefore the law as stated in the case of *McKee v. Nebraska Gas & Electric Co.*, is decisive of the errors alleged in this case.

This case differs in one particular, in that this plaintiff is the owner of land joining the McKee land on the north, and when the Cedar river changed its course as a result of the act of defendant, it ceased to flow past the west side of plaintiff's land, but flowed through the millrace and joined the regular channel of the stream at a point directly west of the southwest corner of plaintiff's land, and he alleged that, as a result of such change, sand-bars formed in the unused channel to the west of his land, and when the river rose to flood stage the waters were thereby forced out of the old channel and onto his land.

The court, by proper instructions, submitted to the jury the question as to whether the flooding of plaintiff's land was caused by the wrongful act of defendant, and the amount of damages, if any, caused thereby. Appellant complains of the giving of instructions Nos. 8, 9, and 10, by the court. We have examined these instructions and find they correctly state the law.

AFFIRMED.

LILLIE LEWIS ET AL., APPELLEES, V. LAWRENCE NEWELL
ET AL.: ARTHUR PARKS, APPELLANT.

FILED APRIL 10, 1923. No. 22318.

Equity: MISTAKE OF FACT: RELIEF. Equity will grant relief from a mistake, as a mistake of fact, where parties are erroneously informed that one party has an interest in certain land by reason of marital relations, and contract with reference to such erroneous information, especially where the party jeopardized thereby can be relieved without substantial injustice to the other side, and the party to be benefited by the mistake invokes the aid of equity to put him in a position where the mistake will be of advantage to him.

APPEAL from the district court for Kearney county:
WILLIAM A. DILWORTH, JUDGE. *Affirmed.*

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C. P. Anderbery, for appellant.

J. L. McPheely and *King & Bracken*, *contra*.

Heard before MORRISSEY, C. J., ALDRICH and GOOD, JJ., BEGLEY and BUTTON, District Judges.

BEGLEY, District Judge.

In 1900 one Elias Kembel died intestate, seised in fee simple of the north half of the northeast quarter of section 17, township 6 north, of range 14, Kearney county, Nebraska, leaving surviving him the plaintiffs, Mary Parks, then Mary Kembel, his widow, Lillie Kembel, now Lillie Lewis, Fred H. Kembel, and Minnie Kembel, now Minnie Nelson. His estate was duly probated, and the county court found by decree that said plaintiffs were his widow and children and assigned said land to them as follows: Mary Kembel, now Mary Parks, the dower interest therein, and to the said children the fee title in undivided shares, subject to said dower interest. Mary Kembel thereafter married the defendant, Arthur Parks, and four children were born of this union.

In 1920 plaintiffs, through the efforts of defendant Newell, a real estate agent, sold the premises to defendant Christian Peterson for \$200 an acre. The family was not living on the premises at this time, and some domestic trouble had arisen between Mr. and Mrs. Parks. He was working at McCook, and she, refusing to live there, was residing at Minden. Mr. Newell informed Mrs. Parks and the other plaintiffs that by reason of his marital relations Arthur Parks had some interest in the premises and it would be necessary for him to sign the deed in order to convey a good title. Plaintiffs had the utmost confidence in Mr. Newell, and, believing that Parks' signature was necessary to convey title, sent for him to come and sign the deed. Mr. Parks, believing that his signature was necessary on the conveyance, refused to sign unless he was paid the sum of \$3,000 from the proceeds of the sale, and, unless same was paid to him, would refuse to allow said deal to be

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consummated. Plaintiffs demurred to this payment, and he insisted, and both parties were again informed by Mr. Newell that the sale could not be consummated unless Mr. Parks signed the deed. Plaintiffs finally agreed to pay the \$3,000 to Parks on his agreement that he would invest it in a permanent home for their mother, Mary Parks. The deed was executed and signed by plaintiffs and Arthur Parks and placed in escrow in the hands of defendant Newell with written instructions to Newell to deliver same to Peterson upon payment of the purchase price on March 1 following, and to distribute the purchase money among the plaintiffs in certain proportions, including the payment of \$3,000 to Arthur Parks.

When March 1, 1921, arrived, defendant Parks informed plaintiffs that he did not intend to invest his money in a home for their mother, but intended using it to educate his children and buy an automobile to take a trip to Denver. Plaintiffs then consulted a lawyer and for the first time discovered that Parks had no interest in the property. They filed this suit after the purchaser, Peterson, had paid the money into the hands of Newell, but before the delivery of the deed to Peterson. In their petition they joined Parks, Newell, and Peterson as defendants, and prayed for an injunction preventing Newell and Peterson from paying the money to Parks, and enjoining Parks from receiving the \$3,000, and asking for a decree finding that same belonged to the plaintiffs. Parks answered, admitting the ownership of plaintiffs in the land, but alleging that he had a certain interest therein by reason of an oral agreement entered into between the parties that he should be compensated for work and labor and improvements erected thereon, and asked that the contract be confirmed. Defendant Peterson filed no answer. Defendant Newell filed an answer alleging that he sold the land to Peterson as agent for plaintiffs, and that at said time, and that at the time the contract was made,

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he believed it would be necessary for said Arthur Parks to join in said deed; that Peterson had paid him the purchase price for the land, which he then held, together with deed, subject to the orders of the court.

The court entered a decree finding for the plaintiffs; that the agreement to pay Parks the sum of \$3,000 was without consideration and unenforceable, granted the injunction as prayed, and ordered distribution of the moneys to the plaintiffs. Defendant Arthur Parks has appealed.

The evidence is insufficient to support the defendant's claim of an oral agreement to reimburse him for work and labor and improvements erected on the premises, and the only question raised by appellant is that it was a mistake of law on plaintiffs' part in entering into the agreement, and therefore a court of equity is powerless to grant relief.

It must be conceded that ignorance of the law excuses no one and equity will not relieve against pure mistakes of law. However, a distinction is made as to ignorance of general law and ignorance of one's private legal rights under the law, arising out of existing facts. In the latter case, when shared by both parties to an agreement and resulting in a loss of the rights of one of them, the agreement may be set aside at the suit of the injured party, though no fraud was practiced upon him. 6 R. C. L. 630, sec. 48.

Here the mistake consisted in an error as to the interest owned by Arthur Parks. It was assumed as a matter of fact that he had an interest, and, though this was based on a mistake of law, it was nevertheless a fact. 13 C. J. 379, sec. 267; 2 Pomeroy Equity Jurisprudence (4th ed.) sec. 839; *Freichnecht v. Meyer*, 39 N. J. Eq. 551; *Healy v. Healy*, 76 N. H. 504; *State v. Paup*, 13 Ark. 129; *Stahl v. Schwartz*, 67 Wash. 25; *Baker v. Massey*, 50 Ia. 399.

The plaintiffs brought their action while the contract was executory. No consideration was received for their

promise. The subject-matter—Parks' interest in the land—had no existence. He is now here asking a court of equity to give him relief by enforcing an inequitable bargain.

That a rescission may be had for a mutual mistake as to the private rights of parties seems to be well settled. Some courts have put it upon the ground of failure of consideration for the promise. In others, that there was a mistake as to the subject-matter, but most courts upon the broad principle that justice and equity require such a rule. In this case there are such elements of absence of consideration, of reliance upon the representations of the real estate agent, of mutual mistake, and unconscionable advantage, as should in equity and in conscience take this case out of the general rule.

The judgment of the district court is therefore right, and is

AFFIRMED.

LIBRARY BOARD OF THE TOWNSHIP OF ARCADIA, VALLEY COUNTY, APPELLEE, V. JOHN OHLSEN ET AL., APPELLANTS.

FILED APRIL 10, 1923. No. 22323.

1. **Damages:** EVIDENCE: INSTRUCTION. Where there are elements of damage, such as expenditures, capable of pecuniary measurement, an instruction stating that it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jury may themselves make such estimate from the facts and circumstances proved, and by considering them in connection with their knowledge, observation and experience in the affairs of life, is erroneous.
2. ———: MEASURE OF DAMAGES. Where a building contract has been substantially performed by a builder and accepted by the owner, subject to any defects being corrected by contractor, the measure of damages for such defects is the cost of remedying same and putting the building in such condition as was required under the plans and specifications, and any other damage the owner has sustained by reason of the defects from the time of the acceptance of the building until the same could have been remedied in the exercise of reasonable diligence.

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APPEAL from the district court for Valley county:
BAYARD H. PAINE, JUDGE. *Reversed.*

Aaron Wall and J. S. Pedler, for appellants.

Davis & Davis, *contra*.

Heard before MORRISSEY, C. J., DAY and ALDRICH, JJ.,
BUTTON and BEGLEY, District Judges.

BEGLEY, District Judge.

This is an action brought by plaintiff to recover damages claimed because of the failure of defendants to properly construct a certain library building in Arcadia, Nebraska, in accordance with the contract and plans and specifications. Plaintiff recovered a verdict by jury, and from the judgment thereon defendants have appealed.

Plaintiff contended that the building was not constructed according to plans and specifications, nor in a workmanlike manner, in that the roof and gutters were not water-tight and the walls, cornices, windows and doors were improperly constructed, without necessary flashings, which permitted the water to come in and damage the building. Defendants admitted the building leaked, but alleged that same was not the fault of material or workmanship, but caused by defective plans, directions and supervision of the architects, who were the agents and superintendents directing and supervising the construction of said building.

Appellants complain of the giving of instruction No. 12 by the court as follows:

"The court instructs the jury that, in case they should come to the question of damages on the issues joined under the instructions of the court, then to enable the jury to estimate the amount of damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jury may themselves make such estimate from the facts and circumstances proved, and by considering them in con-

nection with your knowledge, observation and experience in the affairs of life."

This instruction seems to have first been given in the case of *North Chicago Street R. Co. v. Fitzgibbons*, 180 Ill. 466; a personal injury case where pain and suffering were elements of damage and incapable of pecuniary measurement, and the court was careful to point this out in approving the instruction as follows:

"Where there are elements of damage, such as expenditures, capable of pecuniary measurement, the law requires the amount shall be proved. But there are other elements in this case which are not capable of exact measurement."

The Illinois court in subsequent cases has been equally careful in limiting this sort of instruction except in personal injury cases where the damages were physical pain, suffering and inconvenience suffered or to be suffered in the future in consequence of an injury incapable of pecuniary measurement. *Hatcher v. Quincy Horse Railway & Carrying Co.*, 181 Ill. App. 30; *Barton v. Southwick*, 185 Ill. App. 24; *Harley v. Aurora, E. & C. R. Co.*, 149 Ill. App. 339; *Moore v. Aurora, E. & C. R. Co.*, 150 Ill. App. 484; *Lyman v. Chicago City R. Co.*, 176 Ill. App. 30. A similar instruction was held reversible error in a personal injury case in *Chicago, B. & Q. R. Co. v. Krayenbuhl*, 65 Neb. 889.

In this case the elements of damage were capable of exact measurement and proof, and it was therefore error to give the above instruction. This was the only instruction given on the measure of damages, and the only proof of damage offered was that it would require \$180 to put in a new gutter and 60 cents a yard to replaster the building, but there was no proof of how much plaster would be required. The burden of proof is on the plaintiff to prove the amount of its damage on the several items alleged in the petition, or there can be no recovery thereon. *Fitts & Co. v. Reinhart*, 102 Ia. 311.

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The contract was substantially performed by the builder and the building was accepted by the plaintiff, subject only to the guaranty contained in the contract that the roof should be perfectly water-tight, and that the contractor was to correct all defects discovered within a reasonable time, unless same was shown to be no fault of the material or workmanship, and \$50 was retained as damages for discoloration of the walls at time of acceptance.

It would seem that the measure of damages would be the cost of remedying the defects and putting the building in such condition as was required under the plans and specifications, together with such other damage as plaintiff has sustained by reason of the defects from the time of the acceptance of said building until such time as same could have been remedied by plaintiff in the exercise of reasonable diligence.

Other errors are alleged, but as a new trial must be had, they will not be considered.

For the foregoing reasons, the judgment of the district court is

REVERSED.

A. AVRE, APPELLEE, V. J. R. SEXTON, APPELLANT.

FILED APRIL 10, 1923. No. 23192.

1. **Master and Servant: EMPLOYMENT: WORKMEN'S COMPENSATION ACT.** Where an employer and employee enter into a contract of employment after the taking effect of the workmen's compensation act, both are presumed to contract with reference and subject to the provisions of part II thereof.
2. ———: ———: ———: **NOTICE.** Either party can relieve himself of the operation of the act if he expressly state in the contract, or give written or printed notice to the other party, that he does not accept the provisions of part II.
3. ———: **COMPENSATION: ELECTION.** Where an employer does not take out insurance, or furnish satisfactory proof to the compensation commissioner of ability to pay, as provided in section 3069, Comp. St. 1922. such nonaction on his part has the effect to make him

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liable either to an action for damages at common law, as modified by part I, or for a proceeding for compensation under part II, at the election of an injured employee.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Reversed with directions.*

Rearis & Beghtol and *C. E. Sanden*, for appellant.

Frampton & Polk, contra.

Heard before MORRISSEY, C. J., GOOD, ALDRICH and
LETTON, JJ., BEGLEY, District Judge.

BEGLEY, District Judge.

This case arises under the workmen's compensation act. On or about June 28, 1922, appellant, J. R. Sexton suffered an injury in the employ of appellee, A. Avre, resulting in the total loss of the right eye. An award was made to the employee by the compensation commissioner, from which the employer appealed to the district court for Lancaster county. The district court denied compensation, finding "that at the time of said injury the employer, A. Avre, was not acting within the provisions of the employers' liability act of the state of Nebraska because of his failure to provide insurance as required by section 3069." From this decree the claimant, J. R. Sexton, has appealed.

The appellee did not insure his liability, or furnish evidence to the compensation commissioner of his ability to pay compensation, as provided in section 3069, Comp. St. 1922, and now contends that failure to comply with said section on his part deprives the appellant of the benefits of part II of the compensation act, while appellant contends that the parties hereto elected to come under the provisions of part II of the compensation act by entering into the contract without otherwise stating therein, under section 3035, Comp. St. 1922, and the only way either party can withdraw from said election is by serving notice upon the other as provided in said section.

Section 3035, Comp. St. 1922, provides: "In the oc-

occupations described in section 97 (3029) hereof, and all contracts of employment made after the taking effect of this act shall be presumed to have been made with reference and subject to the provisions of part II hereof, unless otherwise expressly stated in the contract, or unless written or printed notice has been given by either party to the other, as hereinafter provided, that he does not accept the provisions of part II. Every such employer and every employee is presumed to accept and come under part II hereof, unless prior to accident he shall signify his election not to accept or be bound by the provisions of part II. This election not to accept part II shall be by notice as follows:

“(a) The employer shall post and thereafter keep continuously posted in a conspicuous place about the place or places where his workmen are employed a written or printed notice of his election not to be bound by part II hereof, and shall file a duplicate thereof with the compensation commissioner.

“(b) The employee shall give written or printed notice to the employer of his election not to be bound by part II, and shall file a duplicate with proof of service attached thereto with the compensation commissioner.”

Section 3069, provides: “Except governmental agencies, every employer in the occupations described in section 97 of this chapter (3029) shall either insure and keep insured his liability under this article in some corporation, association or organization authorized and licensed to transact the business of workmen’s compensation insurance in this state, or shall furnish to the compensation commissioner satisfactory proof of his financial ability to pay direct the compensation in the amount and manner when due as provided for in this act. In the latter case the compensation commissioner may in his discretion require the deposit of an acceptable security, indemnity or bond to secure the payment of compensation liabilities as they are incurred.

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Every employer who fails, neglects or refuses to comply with the conditions set forth in this section shall be deemed to have elected not to come under part II hereof, and shall be required to respond in damages to an employee for personal injuries, or where personal injuries result in the death of an employee, then to his dependents, in like manner as if the employer had filed an election with the compensation commissioner rejecting the provisions of part II of the compensation act."

Every employer, after the taking effect of the act, is presumed to be within part II, and the only method of removing the application of part II of the act by an employer is for him to otherwise state in the contract, or to post a notice to that effect and file a duplicate thereof with the compensation commissioner. *Nosky v. Farmers Union Cooperative Ass'n*, 109 Neb. 489. Having made a contract with reference to the provisions of part II of the act, an employee cannot be deprived of the right of compensation, except in accordance with those provisions.

It is inconceivable that the legislature, after making it compulsory on both employer and employee to assume their relations as to accident under part II, except upon affirmative, positive election, with notice to each other, should thereupon by a single section of the statute nullify this carefully worked-out plan by providing that the employer may escape the compliance on his part by merely refusing to take out insurance, without notice of any kind to his employee. Part II of the act is more favorable to the employer in enabling him to avoid costly and vexatious lawsuits and the payment of uncertain damages at the hands of the jury, and, on his failure to fulfil the requirements by insuring or guaranteeing his liability, he is, by the terms of section 3069, penalized for such failure by being required to answer to an injured employee, or his dependents, in a common-law action for damages, as modified by part I. There is no mention made therein of the loss of any

rights acquired by the employee under section 3035, and considered in connection with the remainder of the act, section 3069 does not allow the employer to take advantage of his own default in failing to carry insurance, to the detriment of the employee.

We think that the reasonable construction of the two sections is that, where an employer and employee enter into a contract of employment after the taking effect of the workmen's compensation act, both are presumed to contract with reference and subject to the provisions of part II thereof, and the only method by which either party can relieve himself of the operation thereof is to otherwise expressly state in the contract or give written or printed notice to the other party that he does not accept the provisions of part II, and where an employer does not take out insurance or furnish satisfactory proof to the compensation commissioner of ability to pay, as provided by section 3069, such nonaction on his part has the effect of penalizing him by making him liable either to an action for damages at common law, as modified by part I, or for a proceeding for compensation under part II, at the election of the employee.

The same question has been decided under similar statutes in Connecticut and Iowa. In *Bayon v. Beckly*, 89 Conn. 154, it was held that an employee could not be penalized by reason of the employer's failure to insure, and that the employee, regardless of such failure by the employer, has the right to bring a compensation action. The court said: "It is too unreasonable to believe that the legislature intended that the employer, after having accepted part B, should be able to deprive the employee of these benefits, without notice, by simply neglecting to comply with the provisions of the act which he had accepted."

In *Elks v. Conn.*, 186 Ia. 48, in construing an Iowa statute which is in many respects similar to our own, the court held that failure of the employer to carry insurance allowed the employee to sue either at common

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law or under the compensation act, but did not give the employer the right to claim that he was not under the compensation act.

The district court, therefore, erred in dismissing the application and denying compensation to appellant, and the case is remanded, with directions to enter a decree allowing compensation to appellant as provided under part II of the workmen's compensation act.

REVERSED.

DIETZ CLUB, APPELLANT V. WILLIAM NIEHAUS, APPELLEE.

FILED APRIL 10, 1923. No. 23231.

1. **Master and Servant: COMPENSATION.** Section 3069, Comp. St. 1922, does not allow an employer to take advantage of his own default in failing to carry insurance, to the detriment of an injured employee who was presumed to have contracted with reference to part II, under section 3035.
2. ———: **CASUAL EMPLOYMENT.** When a corporation, whose business was the building, furnishing and maintaining a club-house, and all necessary and suitable ground for the promotion and encouragement of outdoor sports, and to provide entertainment, instruction and profit for its members and stockholders, employs a person for a certain period at a fixed sum per hour to care for said grounds, repair the buildings, and prepare and maintain the grounds for outdoor sports, under the direction and supervision of the officers of such corporation during the club season, *held*, such employment was not casual and such employee was engaged in the usual course of the trade and business of such corporation.
3. ———: **DAMAGES.** The amount of the award of compensation examined, and *held* not excessive.

APPEAL from the district court for Douglas county:
CARROLL O. STAUFFER, JUDGE. *Affirmed.*

H. T. White, for appellant.

Eugene N. Blazer, contra.

Heard before MORRISSEY, C. J., GOOD and ALDRICH,
JJ., BEGLEY and BUTTON, District Judges.

BEGLEY, District Judge.

This is a proceeding brought under the workmen's

compensation act by William Niehaus, who obtained compensation for personal injuries sustained by him while employed by Dietz Club, a corporation. From a decree in district court awarding compensation, the Dietz Club has appealed.

The Dietz Club is a corporation owning a club-house and grounds in Omaha, Nebraska, for the entertainment of its members. On March 1, 1921, it employed William Niehaus for a period of six months as caretaker to put the grounds and buildings in repair and to keep them so throughout the season. While at work on the second day of his employment, Niehaus raked and burned some dry grass. The fire spread to some adjacent buildings, and in attempting to extinguish it he fell through the cover of an abandoned well and was injured.

It is first contended by appellant that it is not liable for compensation in this case, as at the time of the injury it was not acting within the provisions of part II of the employers' liability act, because of its failure to provide insurance, as required by section 3069. In the case of *Arre v. Sexton*, *ante*, p. 149, we held that section 3069, considered in connection with section 3035, does not allow the employer to take advantage of his own default in failing to carry insurance, to the detriment of an injured employee who was presumed to have contracted with reference to part II, under section 3035.

It is next contended that appellee was not engaged in the usual course of trade, business, profession or vocation of the Dietz Club at the time of the injury; that he was only casually employed, and then only as an independent contractor. The evidence discloses that the Dietz Club had a club-house for dancing and other amusements; that it had grounds surrounding the club-house with tennis courts and houses for the occupancy of its members; and that its business or purpose was to build, erect, equip, furnish, conduct and maintain the club-house and houses and all necessary and suitable grounds for the encouragement and promotion of outdoor and indoor

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sports, entertainments and pastimes. It was necessary that these buildings, grounds and equipment be kept up and maintained to fulfil the purpose or business of the club. Appellee was employed for that purpose. His duties were fixed by the board of directors and they had supervision and direction over his work. His term of employment was definite. His contract of employment was at a stipulated rate per hour to do certain work designated by the secretary of the club on the property belonging to his employer. He was permitted to do only such work as was directed and approved by his employer. We think under these circumstances he was engaged in the usual trade and business of the Dietz Club; that his employment was not casual; and that he was not an independent contractor.

It is next contended that the amount of compensation allowed the appellee, Niehaus, is excessive. This is based on the theory that his employment was seasonal, and not steady, and that the amount should have been arrived at under section 3049, Comp. St. 1922. The evidence is conflicting as to the actual terms of employment. Appellee testified that he was engaged to work every day from eight to ten hours; that he was directed to rake the grounds and burn the rubbish; that during bad weather, when he was unable to work outside, he was to paint the inside of the club-house and do plaster work and wall-papering. The work on the tennis courts, grounds, etc., was to be done during this entire period, together with the general care of the premises; that when it was necessary to put the tennis courts in condition for use he was to work on Sundays, and that 40 cents an hour was the usual wages he had received from other employers. On the other hand, appellant's evidence was to the effect that it would not require the full time of appellee in the care of the buildings and grounds, unless in case of a rainy season or other contingencies that might add to the work.

Under this conflicting evidence the court fixed the sum

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of \$20 a week as the amount Niehaus would earn during a week. The findings in this case, being based on conflicting evidence, should not be disturbed.

The decree of the district court is therefore right, and is
AFFIRMED.

**ROSS WHITNEY, APPELLEE, V. FARMERS COOPERATIVE
GRAIN COMPANY, APPELLANT.**

FILED APRIL 10, 1923. No. 22326.

1. **Agriculture:** COOPERATIVE COMPANIES: MEMBERSHIP. On account of the mutuality of interest existing between a cooperative grain company and its membership, a member leaves the community and establishes a market place elsewhere when, for any valid reason, he is so located that another market place becomes more accessible to him and he acts honestly in the matter.
2. ———: ———: REPURCHASE OF STOCK. A cooperative grain company may make a valid contract to purchase its own shares of stock, unless restrained by its charter, the statute, or by-law, provided it acts in good faith, without intent to injure creditors or stockholders. And especially is this true when the contract of sale and repurchase are inseparable parts of the same instrument.
3. ———: ———: BY-LAWS. Where a stockholder contracts to be bound by existing and future by-laws, a cooperative grain company may adopt any reasonable by-law, for its government, in harmony with its valid existing contracts and legal obligations, and its members will be bound thereby. It may not, however, adopt any by-law abrogating its valid existing contracts with its members.

APPEAL from the district court for Sarpy county:
JAMES T. BEGLEY, JUDGE. *Affirmed.*

E. S. Nickerson, for appellant.

I. J. Dunn, contra.

Heard before **MORRISSEY, C. J., ALDRICH and DAY, JJ.,
BEGLEY and BUTTON, District Judges.**

BUTTON, District Judge.

Ross Whitney brought this action in the district court for Sarpy county, Nebraska, to recover from the appellant \$1,000 which he paid to said company for ten shares of

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capital stock. Appellee claims he contracted with said company that, if he moved from the community and established his market place elsewhere, the company would refund his money to him. Appellee moved from the place where he lived when he purchased the stock, about one and one-half miles from Springfield, Nebraska, to a place about three and one-half miles from Springfield. Appellee claims that between his new home and Springfield there were several hills, which made it necessary for him to change his market place to Richfield, Nebraska, a town about three and one-half miles from his home. Thereupon appellee demanded a return of his money, and appellant refused to return the money, and this action was instituted.

Appellant claims appellee did not move from the community and establish another market place, and, further, that the by-law, which appellee claims was shown him, has been repealed, and that appellee contracted that he would abide by any change or modification in the by-laws after the date of purchase. A jury was waived and the case tried to the court. The court found for appellee and rendered judgment against appellant for a return of the money. To reverse this judgment, appellant has appealed to this court.

The by-law involved reads as follows: "Any shareholder selling out and leaving the community, thereby establishing his market place elsewhere, may, upon ninety days' notice to the board of directors, receive back from the company the cash he paid to the company for shares of capital stock."

Mutuality of interest is the cardinal principle upon which this organization rests. This company sought a membership which would not only purchase stock but would also patronize the concern, selling their produce to the company and buying what the company had to sell. The company did not care to sell stock and pay dividends to people who could not patronize it. And no one would wish to buy stock who could not

share the benefits growing out of membership in the concern. Out of this mutuality of interest was evolved this by-law. Community, as here used, means so much of the territory lying around Springfield as can and will make it a market center. Appellee moved to a community having Richfield as a market place. Richfield was as far away as Springfield from appellee; but it was more accessible because of hills on the Springfield road. The evidence seems conclusive on this question. We are of the opinion appellee moved out of the Springfield community as a marketing place.

Appellee signed a written contract, called a prospectus, with the company. This contract contained certain suggestions, and No. 6 thereof reads as follows: "Pay back to any shareholder leaving the territory the cash he invested." Acting upon this suggestion the by-law above quoted was prepared. The evidence is conflicting as to whether this by-law was adopted before or after appellee signed the contract. Probably before, for appellee says he refused to sign until this by-law was read to him. But whether the by-law was ever adopted, or if adopted when, or whether ever changed, all seem to depend upon conflicting evidence, and we believe the conclusions of the trial court on these questions are right. The only reasonable construction of this written contract is that appellant agreed to return to appellee the cash he invested if he removed from the territory using Springfield as a market for farm produce.

The weight of authority seems to be that a corporation may purchase its own shares of stock, unless restrained by its charter, or by statute, or by-law, provided the purchase is made in good faith without intent to injure creditors or stockholders. And especially is this true where the contract of sale and repurchase are inseparable parts of the same instrument. *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370; *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, 44 L. R. A. n. s. 156; *Adam v. New England Investment Co.*, 33 R. I. 193.

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Appellant urges that appellee agreed in the contract that he would be bound by future modifications and changes in the by-laws; and claims the by-law providing for refunding money paid for capital stock, where a stockholder moves into another community, had been repealed. The logical answer to this argument is that the evidence is conflicting as to whether or not this by-law has ever been changed. This being true, the finding of the trial court will not be disturbed. And what is more, there is no claim that any by-law has ever been adopted prohibiting the company from purchasing its stock. All that is claimed is that the by-law providing for refunding money to a stockholder, moving out of the community, has been repealed.

But aside from this, we do not understand that the company could abrogate its contract by a by-law. Where a stockholder agrees to abide by existing and future by-laws, there is no question but he is bound by reasonable by-laws, adopted after he becomes a member, regulating the objects and purposes of the mutual society and in harmony with its contracts and legal obligations. *Farmers Mutual Ins. Co. v. Kinney*, 64 Neb. 808; *Hall v. Western Travelers Accident Ass'n*, 69 Neb. 603.

The judgment of the lower court is right, and is

AFFIRMED.

ADOLPH C. BECK, APPELLEE, v. HERBERT O. SPRING:

JOHN A. BENTLEY, APPELLANT.

FILED APRIL 10, 1923. No. 22301.

1. **Witnesses:** COMPETENCY. Evidence, set out in opinion, *held* to show that plaintiff was incompetent to testify to the value of the crop of wheat involved in the transaction.
2. ———; ———. One is not a competent witness as to the value of a tract of land, with a crop of winter wheat growing thereon, as of the date of April, 1920, when the only source of his information is from inquiries made in the neighborhood six months later.

APPEAL from the district court for Douglas county:
CARROLL O. STAUFFER, JUDGE. *Reversed.*

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Brogan, Ellick & Raymond, for appellant.

McKenzie, Cox, Burton & Harris and Radcliffe & Hyde,
contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and
GOOD, JJ., RAPER and TROUP, District Judges.

RAPER, District Judge.

Action to recover damages arising from an alleged
conspiracy to defraud plaintiff in the sale of certain
land in Sherman county, Kansas. From a verdict and
judgment in plaintiff's favor, defendant Bentley ap-
peals.

The alleged fraudulent misrepresentation was that
plaintiff was negotiating for the purchase of a quarter-
section of land in Sherman county, Kansas, and that de-
fendants, to induce plaintiff to purchase same, represent-
ed to plaintiff that the land had been planted in October,
1919, with a good quality of winter wheat, and that the
land was worth \$55 an acre. This representation was
made in the early part of April, 1920, and, in reliance
thereon, plaintiff purchased the land for \$55 an acre,
and under the terms of sale was to have the wheat crop.
It is further alleged that said representations were false,
that the wheat had not, in fact, been planted in October,
1919, but was planted in February and March, 1920,
and for that reason the crop did not mature and was
worthless, and, because the crop was worthless, the land
did not exceed \$15 an acre in value. The defendants in
the transaction were acting for the Bentley Land Com-
pany, from whom plaintiff bought the land.

Error is alleged in the court receiving in evidence
the depositions of certain witnesses, residing in the
vicinity of the land, over objections as to their qualifica-
tions to testify as to value of the land. All were
farmers; some were landowners, and others were not,
but all showed they had some probative information as
to land values in the vicinity of the land in question
in April, 1920. While some of it was weak, it was com-

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petent, and its weight was for the jury to pass on. *Northeastern N. R. Co. v. Frazier*, 25 Neb. 53. The court did not err in admitting the depositions. The only evidence offered by plaintiff as to what the land was worth at the time of purchase, with a growing crop of wheat thereon, such as had been represented, was his own testimony.

Plaintiff lived in Nebraska, far from the land, and was wholly unacquainted with the value of the land and knew nothing of the growing of wheat. He went with defendants in April and viewed the land; saw the wheat, but could not tell whether it was as had been represented, and took the assurance of the defendants and made the purchase. He again visited the land in June and found the crop worthless, but it does not appear that he then made any inquiries as to the value of wheat crops. Again, in September, he went to the land and, from inquiries he made of people in the vicinity on that trip, he was permitted, over defendants' objection, to testify that the land, with a crop of wheat that had been planted in September or October, 1919, was worth in April \$55 an acre, and, without such a crop, was worth only \$15. The foundation for that testimony perhaps can best be shown by quoting his own statements. He was asked if he made any investigation about the market value of the land, and answered:

"I inquired considerably on that trip all through that section of the country. Q. Did you become acquainted with the market value of land? A. Yes, sir. Q. By becoming acquainted with the market value of this land in September, did you know the value of this land when it was sold to you? Were you able or are you able now to state what was the reasonable market value of this land when it was sold to you? A. Yes, sir. Q. In April, 1920? A. Yes, sir. Q. Now, what was the reasonable market value of that land in April, 1920, Mr. Beck, had it been sown with a crop of wheat, best grade of wheat, in September or October of 1919, or the early

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fall of 1919?" Objection made and overruled. "A. \$55 an acre. * * * Q. Now, what was the reasonable value of the land, Mr. Beck, in April, 1920, with the crop on there that was actually on there?" Objection made and overruled. "A. \$15 an acre."

On cross-examination, he could name but two persons with whom he talked. One of these was not a witness. The other one, a Mr. Wells, was called by defendants, and he said he placed the value much higher. Further, on cross-examination, plaintiff stated that he did not obtain any information as to any sales of land in that neighborhood in April, 1920. He further stated that he talked to several farmers. His testimony is clearly incompetent. It is not shown that he talked to any one who was qualified as to the values he gave, nor that he even inquired of any one as to what was the value of a crop of wheat in April, 1920. His estimate of values in that respect does not have the foundation of even hearsay evidence, and his opinion of the value of the land is based wholly on hearsay. The admission of this testimony was clearly erroneous.

Defendants urge that, inasmuch as plaintiff has not completed the contract, entered into between him and the Bentley Land Company, he cannot maintain this action. We do not so consider it. He entered into the contract which can be enforced against him by the vendor, and defendants are not in a position to question that contract. If they made the misrepresentations alleged and plaintiff was damaged thereby, they should suffer the consequences of their acts.

Another alleged error was the refusal of the court to instruct the jury that it was the duty of the plaintiff to make inquiries about the land and crop, and his failure to do so barred him from relying on the representations. Under the circumstances shown, the plaintiff had the right to accept the statements as to the crops and rely on them.

For the admission of plaintiff's testimony as to the

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value of the land with the wheat crop, as it had been represented to him, the cause is reversed and a new trial granted.

REVERSED AND REMANDED.

The following opinion on motion for rehearing was filed September 22, 1923. *Former judgment of reversal set aside and judgment of the district court affirmed.*

Appeal. Ordinarily a judgment will not be reversed for the admission of incompetent testimony, where the same fact has been established by competent testimony, and the evidence erroneously received is merely cumulative.

Heard before LETTON, ROSE, DEAN, ALDRICH, DAY and GOOD, JJ., BLACKLEDGE, District Judge.

DAY, J.

The issues involved in this case may be found in our former opinion reported, *ante*, p. 160, and need not be repeated.

In our former opinion the judgment of the lower court was reversed and the cause remanded for further proceedings, because the court improperly permitted the plaintiff to testify concerning the value of certain lands which plaintiff had been induced to purchase.

The plaintiff has filed a motion for rehearing, upon which a reargument has been had, and now contends that, while it may have been error for the trial court to permit the plaintiff to testify concerning the value of the land, it was, under the facts disclosed by the record, error without prejudice.

Upon the trial the plaintiff testified that, if the land which he purchased had been sown to wheat in the manner represented by the defendants, said land would have been worth in April, 1920, \$55 an acre; that, in the condition the wheat actually was, the value of the land at that date was \$15 an acre. We are still of the view that no sufficient foundation was laid to warrant the court in permitting the plaintiff to so testify. Upon the

reargument, however, it is pointed out that Bentley, the only defendant who has appealed, also testified that at the time of the sale in April, 1920, the land in question was worth from \$55 to \$60 an acre.

It is clear that error cannot be predicated upon the improper receipt of testimony tending to prove a given fact, where the party claiming error properly testified to the same fact. In such case the error is without prejudice. *Smith v. Chicago, B. & Q. R. Co.*, 81 Neb. 185.

It is further urged, however, that it was error to permit the plaintiff to testify concerning the value of the land in the condition it actually was; his testimony being that it was worth \$15 an acre. Several other competent witnesses testified on this precise point, their estimate of the value ranging from \$12.50 to \$15 an acre. While the testimony of the plaintiff was improperly received, under all the circumstances we think it was error without prejudice, being merely cumulative. Ordinarily a judgment will not be reversed for the admission of incompetent testimony, when the same fact has been established by competent testimony, and the evidence erroneously received is merely cumulative.

Besides, it is quite apparent that the jury gave no credence to that part of the plaintiff's testimony to the effect that the land was worth but \$15 an acre. The verdict was for \$4,400, which shows that the jury allowed damages of \$27.50 an acre for the quarter section. If the jury had followed the plaintiff's testimony the verdict would have been for a much larger sum.

Upon a reexamination of the record, in the light of additional argument, we conclude that our former judgment should be set aside, and that the judgment of the district court should be affirmed.

FORMER JUDGMENT SET ASIDE, AND JUDGMENT OF THE DISTRICT COURT AFFIRMED.

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ANDREW J. REED, APPELLEE, v. FRANCIS WELLMAN,
APPELLANT.

FILED APRIL 10, 1923. No. 22158.

1. **Statutes: CONSTRUCTION: CONSTITUTIONALITY.** In the construction of a statute, the word "shall" will be construed as "may" when necessary to sustain its constitutionality, if the intention of the legislature as disclosed by the language of the statute will be thereby accomplished.
2. ———: ———. **BOUNDARIES.** The word "shall" in section 4570, Comp. St. 1922, *held* to be permissive, and not mandatory.
3. **Trial: INSTRUCTIONS: RELOCATION OF SURVEY.** The court in one instruction stated fully and correctly the rules for relocating lost or obliterated corners of a government survey and stated that the question was "not how would an accurate survey locate these lands in question, but how did the original government survey and stakes locate them;" and by the following instruction referred to evidence of a survey made by one Green, saying, "if you find that said Green did follow the rules and instructions of such state surveyor, and if you find from all the evidence, not only of said Green, but all the other witnesses, and the facts and circumstances proved upon the trial, that said Green did accurately make such survey," they should find for plaintiff. *Held*, that the two instructions should be construed together, and that the latter one did not make the verdict depend simply upon the accuracy of the Green survey, but upon whether or not such survey correctly showed the line as established by the government surveyors.
4. **Landlord and Tenant: ADVERSE POSSESSION.** Possession of land acquired under a lease from the owner is not hostile, and does not become so until notice is brought home to the owner of an adverse holding by some unequivocal act of ownership by the claimant.

APPEAL from the district court for Hitchcock county:
CHARLES E. ELDERED, JUDGE. *Affirmed.*

Lambe & Butler and Walter D. James, for appellant.

J. F. Ratcliff and Stewart, Perry & Stewart, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN, ALDRICH
and DAY, JJ., REDICK, District Judge.

REDICK, District Judge.

This is an action in ejectment, brought by plaintiff
and appellee against the defendant and appellant, in

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which there was a verdict for the plaintiff involving about 15 acres of land claimed by the plaintiff to be a part of the north half of the southeast quarter of section 14, and by the defendant to be a part of the northeast quarter of said section. The answer contains three defenses: (1) That the court is without jurisdiction for failure of the plaintiff to comply with section 4870, Comp. St. 1922; (2) that the land in controversy is a part of the northeast quarter of said section; and (3) adverse possession of the said land by defendant for ten years. The material facts are substantially as follows: Sometime prior to 1905 the defendant filed upon the northeast quarter (and later received a patent) and took possession of the same, and was also in possession of the north half of the southeast quarter under a lease from the owner, Nettie Ferris, which lease expired March 1, 1909, at which time the plaintiff went into possession of said 80 acres under a lease from Ferris, and subsequently purchased the same. The deeds, patents and leases describe the two tracts by governmental subdivisions. Sometime between 1905 and 1908 the defendant erected a wire fence upon what he supposed was the boundary line between the two tracts above described. The evidence seems to indicate that as originally built the fence was about 120 rods long and was not completed entirely across the tract until the year 1911, but we do not deem it necessary to determine the legal question suggested by this fact. The west end of the fence was about 20 rods and the east end about 13 rods south of what the plaintiff claims is the true southern boundary of the northeast quarter. Defendant surrendered possession to the plaintiff of the land described in the lease as the north half of the southeast quarter March 1, 1909, but claimed and retained possession of all ground up to the fence just mentioned. There seems to have been no agreement, discussion or dispute between the parties as to the proper location of the boundary line until the spring of 1917, when plaintiff with some other parties

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attempted to remove the fence, and had torn it down with the exception of about 30 or 40 yards at the west end, when they were stopped by defendant. Shortly thereafter plaintiff brought an action in equity in the district court for Hitchcock county to enjoin the defendant from interfering with plaintiff's possession of the 15 acres in dispute, which resulted in a decree for the plaintiff on the 21st day of May, 1918. The district court having refused to fix a supersedeas bond, the defendant removed his fence and gave up possession. The decree, however, was reversed by the supreme court, and mandate sent down April 27, 1920, on the ground that plaintiff's action should have been at law, in ejectment, the plaintiff's forcible entry not constituting an interruption of defendant's possession. *Reed v. Wellman*, 104 Neb. 292. The court, however, declined to determine any questions of title, leaving the same to an appropriate action at law. Thereupon, on the 28th day of May, 1920, this action was commenced.

We will take up the discussion of the question presented on this appeal in the order of the defenses as above given, and, first, the jurisdictional question. Section 4870, Comp. St. 1922, is as follows:

"In case of any dispute among owners of and arising for or by reason of any survey of boundaries of lands within this state, or in case of dispute or disagreement between surveyors as to said surveys of boundaries, the same shall be referred to the said state 'surveyor and draughtsman' for settlement, and he is hereby appointed as arbitrator to settle and determine such disputes or disagreements as to said surveys and boundaries, and whose decision shall be *prima facie* evidence of the correctness thereof. In making such surveys, the state surveyor and deputies shall, each of them, have power in any county of the state of Nebraska to summon and compel the attendance of witnesses before them to testify as to material facts relating to their knowledge of 'lost or obliterated' corners. Said state surveyor and deputies

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are hereby authorized and empowered to administer oaths and affirmations to their assistants and to witnesses. There shall be paid to the state treasurer for the services of the said state surveyor and draughtsman in settling and disposing of the said dispute and differences the sum of eight dollars per day for each day's service actually performed by the said state surveyor and draughtsman, to be paid by the parties directly interested in the said controversy and said survey or said boundaries; and said sum or sums of money so received therefor shall be paid into the state treasury for the benefit of the general fund of the state."

The act passed in 1919 was a reenactment of section 4 of an act found in chapter 105, Laws 1903, the title to which latter act is in the following words: "An act providing for the appointment of a state surveyor and draughtsman in the office of the commissioner of public lands and buildings and to prescribe his duties." This was the first appearance of legislation of this character in this state. In 1909 (Laws 1909, ch. 137) the act of 1903 was amended and became section 5566, Rev. St. 1913. In 1919 (Laws 1919, ch. 54) section 5566, Rev. St. 1913, was amended, and said section repealed, which amendment was the reenactment above quoted (Comp. St. 1922, sec. 4870), the only change being in the *per diem* of the state surveyor from \$6 to \$8. The title of the act in 1919 was as follows: "An act to amend section 5563, 5565, and 5566, Revised Statutes of Nebraska for 1913, and to repeal said original sections and to declare an emergency."

It will thus be seen that it is necessary, in order to determine whether the amendments of the act of 1919 are germane to the original act or within its title, to revert to the title of the act of 1903 which is above set out; and it seems to us beyond any chance of controversy that the provisions of the act of 1919, if given the construction claimed for by the appellant, would be unconstitutional on the ground that the title to the

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act gives no intimation that such provisions will be inserted and that the act to that extent, therefore, is broader than the title. The provisions specially referred to are those for the appointment of the deputy surveyor as an arbitrator to whom the parties involved in a dispute over boundaries of land must first present their respective claims and procure the decision of the surveyor thereon, which, in effect, seeks to provide a condition precedent to the presentation of the dispute to the courts of the state. The title, of course, is broad enough to compass the provision requiring the state surveyor to survey the disputed boundary and make a report thereon, because these may justly be considered as related to the performance of the duties of his office; but imagination falters when it is sought to wring from the words of the title any intention of the legislature to provide for a tribunal for the settlement of private disputes and to withdraw from the citizen his constitutional right to present his troubles to the courts and have them decided according to the law of the land, or prescribe a condition precedent to the exercise of such right.

However, it does not appear necessary at this time to determine the constitutionality of the section in question, as the section may be upheld under proper rules of construction so that the real intention of the legislature may be given effect. If the act is capable of two constructions, one of which would result in declaring it unconstitutional and the other leave it in force as a valid enactment, the latter construction, of course, must be preferred.

The concrete question then is whether the word "shall" in the sentence "the same shall be referred to the said 'state surveyor and draughtsman' for settlement" shall be construed as mandatory or permissive. If mandatory, as above suggested, we would be compelled to hold the law invalid. But the presumption always is that the legislature did not intend to do

an unconstitutional act or to pass a law in an unconstitutional manner, and where to construe the statute as mandatory would make it unconstitutional such construction will be rejected if any other is possible. *In re Picquet*, 5 Pick. (Mass.) 65. Another principle to be borne in mind in determining whether or not a statute is mandatory or permissive is that, where the words are such as would naturally be used to prescribe directions for the orderly dispatch of business, they will not be construed as mandatory in the absence of negative or prohibitive words, or words expressive of a condition precedent. *Spencer's Appeal*, 78 Conn. 301.

With these principles in view, it seems that the word "shall" should be construed as permissive rather than mandatory, which will effectuate the intention of the legislature to provide by agreement of the parties a prompt and inexpensive method of determining disputed boundaries, without interference with the common law and constitutional right of the citizen to appeal to the courts. It follows that the court had jurisdiction and the first defense is not well taken.

The second question involves the true location of the south boundary of the northeast quarter of section 14. The evidence upon this question consists of a survey made by the county surveyor of Hitchcock county and his testimony regarding the same, and the evidence of the defendant and other witnesses as to the original location of the government corners. It presents some disputed questions of fact for the jury, whose finding thereon must control unless the record discloses error in the instructions of the court on the submission of the case to the jury. The instructions were very full and complete, and defendant's first complaint refers to No. 7, as follows:

"You are instructed by the court that in determining the question as to whether the land in dispute belongs to the subdivision owned by the plaintiff, to wit, the north half of the southeast quarter of section 14, in township

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3 north, of range 35 west of the sixth principal meridian, you should ascertain whether surveyor R. O. Green followed the rules and instructions of the state surveyor in locating lost and obliterated corners, and in making surveys to establish the true boundary lines in dispute in this action. If you find that said Green did follow the rules and instructions of such state surveyor, and if you find from all the evidence, not only of said Green, but all the other witnesses, and the facts and circumstances proved on the trial, that said Green did accurately make such survey, and if you further find that such survey shows the tract of land in dispute belonged to the north half of the southeast quarter of said section 14, then it will be your duty to return a verdict in favor of the plaintiff, unless you find that the defendant has secured title to said disputed tract of land by adverse possession, as in these instructions defined."

Defendant contends that this instruction gives undue prominence to the Green survey; but it will be observed that the court tells the jury that they must consider the survey with the testimony of "all the other witnesses, and the facts and circumstances proved on the trial." We think, in view of the fact that Green was the only expert testifying, the court did not infringe upon the proprieties by this instruction. The court merely told the jury that if they found from all the evidence in the case that the survey of Green was correct they should find for the plaintiff, and this instruction, when read with No. 6, quoted later, clearly informed the jury that the real question was, not where Green located it, but where the government surveyors located the boundary line.

Another objection is that the instruction left to the jury to determine whether or not, in making his survey, Green had complied with the rules of the state surveyor in locating the corners, but that the rules *in toto* were not in evidence, and, therefore, there was nothing upon which the jury could base their finding. But it

appears that several sections of the rules applicable to that particular question were read in evidence by the witness, and the instruction must be construed as referring only to that portion of the rules in evidence.

A further objection is that the instruction made the determination of the boundary to depend upon the correctness of the Green survey. But instruction No. 6 clearly told the jury that the survey, to be correct, must correspond with the corners originally placed by the government surveyor, and that corners so established could not be moved and must be accepted. We think that instruction No. 6 correctly stated the law regulating the establishment of lost or obliterated government corners, and that the two instructions together are correct, and that the jury must have understood therefrom that before they could find the Green survey correct they must be satisfied that it established the line as originally surveyed.

In this connection defendant further calls attention to the fact that the northwest corner of section 16 was erroneously located by the survey in question as established in a survey made about a year later by the witness Green. The witness, however, testified that the establishment of that corner was not necessary to the determination of the boundary line in question, which was determined by measurements on the north and south lines of the section about which there is no dispute. The evidence shows that the surveyor started at a well-established government corner at the southeast corner of section 24 and ran north to the east quarter corner of section 1, also fully established, the distance corresponding closely with the government notes, and then by proportionate distances established the east quarter corner of section 13. He then ran a line from the southwest corner of section 24 to the northeast corner of section 14 in the same manner; and then started at the southwest corner of section 14 and ran north to the

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west quarter corner of section 2 (located by testimony) and by proportionate distances located the west quarter corner of section 14. A straight line drawn from the east to the west quarter corner of section 14 as thus established shows the 15 acres in dispute to be within the north half of the southeast quarter. None of these corners except the first two mentioned gave unequivocal evidence of being government corners, such as the existence of mounds or pits, but stones were found at various places where the government notes indicated the corners had been located by the government surveyor, and the corners so taken by Green had never been disputed and had been acquiesced in by the owners for many years. We think the survey of Green was based upon correct principles and calculated to establish the original location of the corners as closely as possible. The defendant Wellman testified that as late as 1915 he had seen a mound and two pits about 12 or 13 rods south of the point where Green located the east quarter corner of section 14, and defendant claims that this established a government quarter corner at that point; but this was a question for the jury, and the witness Wellman was impeached by a number of witnesses called for that purpose. The northeast corner of section 14 is not in dispute. In fact, there is testimony to the effect that the defendant assisted in the locating of that particular corner, and using this corner in connection with the east quarter corner, established by Green, and extending the lines at right angles around the northeast quarter, gives defendant approximately 160 acres and 160 acres to the southeast quarter, which are the areas called for by the government notes; while, if defendant's position is correct, the northeast quarter would contain approximately 175 acres. Our references to the government notes are taken from the Green field notes and his testimony, as the government notes, while mentioned as an exhibit in the bill of exceptions, are not attached, and

many of the questions with reference thereto raised in defendant's brief on that account cannot be considered.

On this point defendant also urges error in the refusal of the court to give to the jury his fifth request, as follows:

"You are instructed that, in determining disputed boundary lines between land, testimony of a nonexpert or nonexperts that he or they saw and located the line from government corners then in existence may be accepted by you, if you believe their testimony in preference to that of surveyors who have subsequently located a different line independently of such government corners."

This is undoubtedly a correct statement of the law, but was sufficiently covered by instruction No. 6, as follows:

"The question in this case as to the true location of the boundary line between plaintiff's and defendant's respective lands is not how would an accurate survey locate these lands in question, but how did the original government survey and stakes locate them. The only purpose of the evidence of surveyors, who have made recent surveys, is to enable the jury to locate the original boundaries, if possible, and not for the purpose of determining where they ought to have been, or where they would have been by an accurate survey. The original starting points and boundaries are questions of fact for the jury to find from the evidence; not only the evidence of surveyors, but all other evidence in the case bearing upon these points.

"If you believe the evidence clearly establishes the location of the original government corners, you are instructed that the location of such government corners, no matter how erroneous or faulty they might have been, control over all subsequent surveys at variance thereto by whomsoever made. If you believe from the evidence that the boundary line of the strip of land in con-

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troverſy as claimed by defendant is in accord with the location of the original government corners, if ſuch corners are clearly eſtabliſhed by the evidence, then your verdict ſhould be for the defendant."

On the whole, we find no prejudicial error in the inſtructions upon this branch of the caſe and are therefore bound to accept the verdict of the jury.

The third defense is adverse poſſeſſion, the defendant claiming that he had been in the open, notorious, and hostile poſſeſſion of the ſtrip in queſtion for ten years and more prior to the commencement of this ſuit. In relation to this defense the facts appearing from the record are ſubſtantially as follows: The defendant was the owner of the northeast quarter, and one Nettie Ferris of the north half of the ſoutheast quarter, and ſometime prior to March 1, 1909, defendant leased of Ferris the eighty belonging to her, ſaid lease expiring the date mentioned. Defendant went into poſſeſſion of the eighty under the lease, and ſubſequentlly built the boundary fence in diſpute, which at firſt extended only about 120 rods, the remainder not being completed until 1911. Defendant teſtified ſeveral times that he did not claim any land not included in the northeast quarter, but alſo that he claimed up to the line of the fence. The plaintiff leased from Ferris beginning March 1, 1909, and did not become the owner of the land until 1916. Upon the expiration of the defendant's lease of the north half of the northeast quarter, he ſurrendered poſſeſſion thereof to plaintiff, but the fence remained where it was along the ſouthern boundary of the ſtrip in diſpute. Plaintiff teſtified that a conſtable told him that, on behalf of Ferris, he had ſerved notice upon defendant in the fall of 1909 to remove the fence. Defendant moved to ſtrike out this teſtimony as incompetent, and the motion ſhould have been ſuſtained, though the court overruled it. Then followed the injunction ſuit, upon the entry of the decree in which, May 21, 1918, the court having reſuſed to fix a ſupersedeas bond, defendant moved the boundary fence

in dispute to the southern boundary of the northeast quarter, as found by the court, and did not replace it until April 27, 1920, when the decree in the equity suit was reversed. This action was begun May 28, 1920.

It will thus be noted that the dispute whether the fence was erected in 1905 or 1908 is immaterial; it was erected during the term of the lease under which defendant acquired possession. When defendant surrendered possession he retained that portion of the eighty which is in dispute; as to which, therefore, as between him and Ferris, he was holding over, and this relation of the parties continued until, by some unequivocal act upon the part of the defendant, his landlord, Ferris, received notice that he claimed title. The mere fact that he did not surrender possession was not such an act, because, such possession having commenced while defendant was a tenant of Ferris, he is presumed to continue in possession as a tenant; and the failure of the defendant to move the fence after notice by Ferris was as consistent with a claim as tenant as with a claim as owner.

In *Perkins v. Potts*, 52 Neb. 110, it was held: "One who takes possession of real estate as the tenant of another cannot hold said real estate adversely to his lessor without first having actually or constructively surrendered the premises to him."

In *Schields v. Horbach*, 49 Neb. 262: "A tenant by simply 'holding over' after the expiration of his lease does not hold adversely. Until he surrenders possession of the leased premises, or by some unequivocal act notifies the landlord that he no longer holds under the lease, he cannot claim that his possession is adverse."

In *Ross v. McManigal*, 61 Neb. 90, it was held: "Before a tenant can initiate an adverse holding and set the statute of limitations running in his favor, he must either yield up possession, or else distinctly repudiate the relation created by the lease and bring home to the lessor knowledge of the fact that the tenancy has been terminated."

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In *Carson v. Broady*, 56 Neb. 648: "A tenant remaining in possession of the demised property after the expiration of his term, without any open or express repudiation of the relation created by the lease, is not, in contemplation of law, holding adversely to the owner, whatever may be his secret intention." And at page 651, the court, by Sullivan, J., said: "The relation of landlord and tenant was created by the lease. The defendants, until the answer was filed in this case, did not repudiate that relation or indicate by any clear and unequivocal act their intention to hold adversely. Under these circumstances their holding was not adverse, in contemplation of law, whatever may have been their secret purpose. Besides, at the time they obtained possession, they were, with the plaintiffs, tenants in common of the land. They were negotiating for the purchase of the plaintiffs' title; they recognized its validity then, and even as late as 1889 made application to buy it. They did no act at any time evincing an intention on their part, to oust their co-tenants; and they could not by a mere silent, peaceable possession, however long continued, extinguish the plaintiffs' title (citing cases)."

It seems to us the principles of these decisions control the case at bar. Ferris and her successors in title until 1916 were entitled to notice from defendant by some unequivocal act that he was claiming adversely; the acts or language of the plaintiff while he was a mere tenant of the land would not affect the title of the owners—he was not their agent for such purpose.

The defendant requested an instruction to the effect that, where a boundary fence had been acquiesced in by joint owners for the full period of limitations, the parties were estopped from claiming its incorrectness; this instruction was refused, and the defendant assigns error therefor. The ruling of the district court was correct. Defendant argues that inasmuch as plaintiff, while a tenant, erected a fence a few feet south of defendant's fence, and broke ground up to defendant's fence in 1909,

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these acts constituted a recognition of defendant's fence as the dividing line. But, as just suggested, the tenant cannot bind his landlord by such acts; the owner alone, or his duly authorized agent is the only party who may be estopped in that manner. We therefore conclude that on the undisputed facts of this record defendant's possession was not adverse. We have examined with care the instructions of the district court, and find no error therein prejudicial to the defendant, and on the entire record conclude that the judgment should be affirmed, and it is so ordered.

AFFIRMED.

FRED SCHREIFER ET AL., APPELLANTS, V. CITY OF AUBURN
ET AL., APPELLEES.

FILED APRIL 21, 1923. No. 22773.

1. **Municipal Corporations: PAVING: SPECIAL ASSESSMENTS: VALIDITY.** A special assessment to pay the cost of paving is not invalid merely because the surveys and estimates to be made by the city engineer under the provisions of section 5011, Rev. St. 1913, were not made by the regularly elected engineer, but by a firm of expert engineers employed specially to render that service, where the elected city engineer was not competent to perform it.
2. ———: **PAVING DISTRICTS.** The city council of a city of the second class is not required to establish by ordinance a grade upon a street forming a part of a paving district as a condition precedent to the establishment of such district.
3. ———: **ORDINANCES: AMENDMENT.** Section 4443, Comp. St. 1922, creates no inhibition against the amendment of an ordinance enacted by the mayor and city council of a city, notwithstanding the submission of such ordinance to a vote of the electors of the city.
4. ———: **PAVING: SPECIAL ASSESSMENTS: VALIDITY.** A tax for special benefits arising from the laying of pavement on the street of a duly established paving district is not void merely because the city council entered into a single contract with an engineering firm under which it did the necessary engineering work and made the estimates of the cost of paving in the several districts, where the compensation for such service was based upon a percentage cost of the improvement and the property improved in each district was charged its proper share on the basis of the cost of the improvement.

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APPEAL from the district court for Nemaha county:
JOHN B. RAPER, JUDGE. *Affirmed.*

Sterling F. Mutz, for appellants.

H. A. Lambert and Ernest F. Armstrong, contra.

Heard before MORRISSEY, C. J., ROSE, DEAN, DAY and
GOOD, JJ.

MORRISSEY, C. J.

The city of Auburn, a city of the second class, by several separate ordinances created four paving districts and caused the several districts to be paved. The appellants in this action, who are property owners within district No. 7, filed objections to the contemplated improvement before the contracts were let or the work was done, and, when the city council convened as a board of equalization for the purpose of making special assessments against the property within the improved district, they appeared and protested against the levying of assessments upon their several properties. Feeling aggrieved by the several orders of the city council acting as a board of equalization, they prosecuted error to the district court, where the findings and orders of the city council were approved. From the judgment of the district court they have appealed. Appeals have also been taken which involve other districts and the parties have to a great extent undertaken to consolidate the issues presented for review.

1. At the time the improvement was undertaken the city was without an engineer competent to make an estimate of the cost of the improvement, therefore the city employed a firm of expert engineers for that purpose, and an estimate in due form was made by this firm.

It is argued that this was not a compliance with the statute, section 5011, Rev. St. 1913. In *Diederich v. City of Red Cloud*, 103 Neb. 688, substantially the same question was presented. That was an injunction action where the proceedings were collaterally attacked, but the discussion on the sufficiency of the estimate made by

engineers especially employed for the purpose is illuminating. The court said:

"The evidence shows that in this case, as in other towns of this class, the city engineer is chosen without reference to his qualifications to make a proper estimate of the items of cost of extensive street paving. The city engineer was a witness upon the trial, and his evidence shows that he was not qualified, and did not consider himself qualified, to make an estimate of such extensive street paving, and that the city council, with his knowledge and consent, employed competent engineers who did make the estimate. It does not appear that any objection was made to the estimate on the ground that it was not made by the city engineer until after the paving was done. While the letter of the statute is that the city engineer shall make estimates, the preceding direct statement of the improvements for which the city engineer shall make estimates might indicate that the legislature did not have extensive paving in towns of this class in view, for which it would be necessary to employ more competent engineers. When the statute was enacted in 1879, neither the legislature nor any one else contemplated that towns of this class would do extensive paving. If the present situation had been contemplated by the legislature, we may well suppose, in view of the provisions of this comprehensive act, that the language of this section would have been more explicit. Under all of the circumstances, we cannot conclude that it was the intention of the legislature to prevent the city council from securing the necessary services of competent engineers under such conditions as these."

2. "There was no ordinance establishing the grade or repealing prior ordinances establishing grade." A sufficient answer to this statement is that there is no statute pointed out which made it incumbent upon the city council to establish a grade by ordinance as a condition precedent to the organization of the paving district. The statute confers authority upon the city council to establish grades, but it does not require the exercise of

such power as a condition precedent to the establishment of the paving district.

3. "An ordinance cannot be changed when submitted under the referendum until after one year." After the passage of the ordinance creating paving district No. 7, dissatisfied parties caused it to be submitted to a referendum vote, where it received the approval of a majority of those voting thereon. The paving district as created by the ordinance extended from the north line of Twentieth and O streets to the south line of Twenty-ninth street at Twenty-ninth and O streets, and extended west along Twenty-ninth street about two blocks. After the referendum vote had been taken the city council by resolution excluded from the operation of the ordinance the paving of that part of Twenty-ninth street which had been included in the district, and the paving was subsequently laid on O street only. The council made changes in the work on O street. The ordinance originally provided for paving the roadway 50 feet in width. On petition of the property owners the paved roadway was reduced to 30 feet in width between Twenty-first street and Twenty-second street. Certain changes were also made relating to sidewalk construction. It is claimed that under section 4443, Comp. St. 1922, an ordinance cannot be changed after its submission to a referendum vote until the expiration of one year from and after the vote has been taken. We do not so construe the statute. It reads: "The mayor and city council shall have no power to enact a law which shall in any manner alter, modify, impair or render nugatory ordinances which have been enacted by a direct vote of the voters of such city under the provisions of this article, except by a yea and nay vote of two-thirds of the city council: Provided, however, no such vote shall be taken within one year from the time of its enactment." It will be seen that this relates to ordinances "which have been enacted by a direct vote of the voters." It does not purport to cover ordinances enacted by the mayor and

city council and referred to the voters for their rejection or approval under the provisions of the statute permitting a referendum.

4. It is said that following the enactment of the several ordinances which created paving districts 4, 5, 6 and 7 there was but a single contract with the engineering firm and that it covered work in the four districts, and that there was but one contract for laying the paving in the four districts; that the estimate of costs upon which the city based its advertisements for bids was made jointly as to all districts; and that the various incidental items entering into the improvements made in the several districts were consolidated, and later prorated according to the front footage in each district, and that this procedure renders the whole levy invalid. In support of this contention, it is argued that the engineering work was more difficult in one district than in another and that necessarily the charge made by the engineers might have been less in a given district had the contract been restricted to the work to be done in the district calling for the less difficult work. It is claimed also that by calling for engineers who were able to do the work in the four districts all engineers were excluded except those who were able to handle the larger projects; that if the city had sought separate engineers for each district it might have procured an engineer for each district who would have done the work at a reduced rate but who was deterred from entering the field because of the extent of the work as contemplated by the four projects. We do not say that this is not within the realm of possibility. All things are possible. But it is not within the realm of probability. Indeed, it is more probable that the engineering cost to each district was less because the engineering firm had the larger contract. The traveling expenses and overhead charges that necessarily entered into the engineering expense, in all probability, was reduced because of the method employed rather than the method suggested by counsel. The compensation of the engineering firm was

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based upon a percentage cost of the improvement and each district bore its proper share and no more. Appellants' complaint on this basis is without substantial merit.

A number of complaints which we have not mentioned are contained in the brief but they are not found to be of such a character as to require specific discussion. No prejudicial error is found in the record and the judgment is

AFFIRMED.

H. R. HOWE ET AL., APPELLANTS, V. CITY OF AUBURN ET AL.,
APPELLEES.

C. L. MYERS ET AL., APPELLANTS, V. CITY OF AUBURN ET
AL., APPELLEES.

FILED APRIL 21, 1923. No. 22817.

APPEAL from the district court for Nemaha county:
JOHN B. RAVER, JUDGE. *Affirmed.*

Kelligar & Ferneau, for appellants.

Heard before MORRISSEY, C. J., ROSE, DEAN, DAY and
GOOD, JJ.

MORRISSEY, C. J.

The appeal in this case involves the validity of special assessments made against the property of the appellants situated in paving district No. 4 in the city of Auburn. The issues presented are substantially the same as those in the case of *Schreifer v. City of Auburn*, ante, p. 179. The cause is controlled by the opinion and judgment in that case, and, on the authority thereof, the judgment of the lower court is

AFFIRMED.

WILLIAM H. BOUSFIELD ET AL., APPELLANTS, V. CITY OF
AUBURN ET AL., APPELLEES.

FILED APRIL 21, 1923. No. 22818.

APPEAL from the district court of Nemaha county:
JOHN B. RAVER, JUDGE. *Affirmed.*

Seymour v. Standard Live Stock Commission Co.

Kelligar & Ferneau, for appellants.

H. A. Lambert and Ernest F. Armstrong, contra.

Heard before MORRISSEY, C. J., ROSE, DEAN, DAY and GOOD, JJ.

MORRISSEY, C. J.

The appeal in this case involves the validity of special assessments made against the property of the appellants situated in paving district No. 6 in the city of Auburn. The issues presented are substantially the same as those in the case of *Schreifer v. City of Auburn*, ante, p. 179. The cause is controlled by the opinion and judgment in that case, and on the authority thereof, the judgment of the lower court is

AFFIRMED.

GEORGE N. SEYMOUR, APPELLANT, V. STANDARD LIVE STOCK
COMMISSION COMPANY ET AL., APPELLEES.

FILED APRIL 21, 1923. No. 22330.

Chattel Mortgages: WAIVER OF LIEN. "Where a mortgagee of chattels authorizes the mortgagor to sell the property described in the mortgage at private sale, and with the proceeds pay the mortgage debt, and the sale is accordingly made, the mortgagee has thereby waived his lien." *Drexel v. Murphy*, 59 Neb. 210.

APPEAL from the district court for Dodge county:
FREDERICK W. BUTTON, JUDGE. *Affirmed*.

Williams & Kryger and J. A. Donohoe, for appellant.

Dolezal, Spear & Mapes, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and DEAN, JJ., BEGLEY, District Judge.

LETTON, J.

This action is brought against the Standard Live Stock Commission Company and the Idlewild Farm Company for conversion of certain property covered by a chattel mortgage in favor of the plaintiff. The defense is release of the mortgage lien by permission given the mortgagor

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to sell the property, and also ratification of the sale by the acceptance of a part of the proceeds, with knowledge of the facts.

Plaintiff is a banker at Elgin. He was the holder of a note executed by Andrew Wytaske for \$6,730.60 payable December 12, 1920. This note was secured by a chattel mortgage upon 54 head of four-year-old steers, and upon other property. One Bennett was the agent of the plaintiff, employed by him to check up and inspect property covered by chattel mortgages in which he was interested. On December 6, 1920, Bennett went to the farm of Wytaske 16 miles northeast of O'Neill. He and Wytaske had a conversation about the debt and the chattel mortgage. Wytaske requested an extension of time, but Bennett told him Mr. Seymour wanted the money. Wytaske said he would have to ship and sell the cattle in order to pay the debt. Bennett requested him to ship the cattle in Mr. Seymour's name, or to have the money sent to the Elgin State Bank.

It is clear that Bennett knew that the cattle must be sold in order to pay the debt, and that the usual and ordinary method of sale of such cattle was by shipment to South Omaha, or some other market. It seems evident from his own testimony that this was the customary method of procuring the money to pay such mortgage debts, and that he expected Wytaske to ship the cattle as soon as he could obtain cars. On December 13, Wytaske shipped the cattle to the Standard Live Stock Commission Company, defendant, at South Omaha. One of the cars was shipped in his own name, another in the name of his son, Stanley, and about half a car-load in the name of one Kraft, who also had half a car-load of cattle in the same car. The commission company paid Andrew Wytaske \$600 in cash, paid Stanley Wytaske, who accompanied his father, \$600 in cash, and remitted \$2,887.71 to a bank at O'Neill to be credited to the account of Stanley Wytaske. There is a stipulation in the record that the commission company was directed to make this remittance by both

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Andrew and Stanley. A few days afterwards Stanley withdrew \$1,800 in money from the bank and absconded, and on the same day \$1,087.71, the remainder of the deposit, was credited to the account of Andrew Wytaske. Plaintiff received \$1,026.46 from the amount in the bank, the remainder being applied on a note due from Andrew to the O'Neill bank.

Part of the cattle were sold by the purchaser from the commission company to the Idlewild Farm Company of Fremont, and it is in order to recover the value of these cattle that that corporation is made a defendant to the suit.

Plaintiff insists that when the commission company purchased the cattle it was charged with notice of his lien, which was a matter of public record, and is therefore liable for the value of the cattle. That it was chargeable with notice may be conceded. But we are satisfied that there was permission given to Wytaske to ship and sell the cattle, and this permission released the mortgage so far. Mr. Seymour denies that he ever gave permission to sell the cattle, but Bennett told Wytaske that he might sell if he shipped the cattle in Mr. Seymour's name, or had the money sent to the Elgin State Bank, and the facts in the case justify the conclusion that he had authority to give such direction. Even though the consent to sell was made upon such conditions, this would not affect the rights of the commission company, which had no knowledge of any such condition. By this permission Wytaske was made the agent of the mortgagee to sell and account for the proceeds, and a failure on his part to carry out the confidence reposed in him can only concern the mortgagee, who trusted him. *Littlejohn v. Pearson*, 23 Neb. 192; *Drexel v. Murphy*, 59 Neb. 210; *Tucker v. Mann*, 124 Ga. 1003; *Minneapolis Threshing Machine Co. v. Calhoun*, 37 S. Dak. 542; *Rusk County Lumber Co. v. Meyer*, 126 S. W. (Tex. Civ. App.) 317; *Flenniken v. Scruggs*, 15 S. Car. 88; *Pecos Valley Bank v. Evans-Snyder-Buel Co.*, 107 Fed. 654; *Anderson v. South Chicago Brew-*

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ing Co., 173 Ill. 213; *Carr v. Brawley*, 34 Okla. 500, 43 L. R. A. n. s. 302.

The title to the property passed to the purchaser at the South Omaha market. The Idlewild company became vested with a good title upon its purchase from him. Furthermore, plaintiff accepted part of the proceeds of the sale after having knowledge of the transaction, and he is therefore estopped as against a purchaser to assert that the sale was invalid. *Ayres v. McConahey*, 65 Neb. 588.

AFFIRMED.

CHARLES A. FORSLUND, APPELLEE, V. HENRY F. SWENSON
ET AL., APPELLANTS.

FILED APRIL 21, 1923. No. 22353.

1. **Trial:** APPORTIONMENT OF DAMAGES. A jury may not in a verdict against joint tort-feasors apportion the amount of damages which each shall pay.
2. ———: VERDICT. In an action for personal injuries against joint defendants, the jury returned into court with a verdict assessing the damages against one defendant at the sum of \$5,000, and against the other at \$2,500. The court refused to receive the verdict, and instructed the jury to correct the verdict by simply finding the amount of plaintiff's damages, if any. After further consideration by the jury, a verdict was returned against both defendants for \$7,500. *Held*, that this was proper practice, and that the verdict, as finally delivered, was valid.
3. ———: JURY: POWERS OF COURT. Section 8806, Comp. St. 1922, relating to the polling of a jury, does not deprive the court of any of its former powers.
4. **Evidence** examined, and held to support the verdict.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed*.

Stout, Rose, Wells & Martin, Jefferis, Tunison & Wilson
and *Ralph A. Van Orsdel*, for appellants.

Gurley, Fitch & West, contra.

Heard before MORRISSEY, C. J., LETTON, DAY and DEAN,
J.J., BUTTON, District Judge.

LETTON, J.

This is an appeal from a judgment against defendants rendered in an action for personal injuries. Plaintiff alleges that he was severely injured by the overturning of an automobile which he was driving, by reason of it coming in contact with a pile of coal which had been negligently placed and suffered to remain in a street by the defendants. There is much conflict in the evidence, but the jury adopted the theory of plaintiff.

The facts are as follows: Defendant Swenson, who resides on the north side of Hawthorne avenue in Omaha, and upon the east side of a driveway leading to the rear part of the lot, had ordered from defendant Rosenblatt, a coal dealer in the city, a number of tons of semi-anthracite coal. Part of the coal was to be delivered by the coal dealer into bins in the cellar of an apartment house at No. 3624 Hawthorne avenue. According to the testimony of teamsters employed by Rosenblatt, when they attempted to deliver the coal as ordered, Mrs. Swenson told them that the bins in the cellar were not ready, and directed them to unload the coal in the street near the driveway, which they did. Several tons of the coal were unloaded, part of it in the parking space next to the north curb line, and the greater part in the street east of the driveway.

A lantern with a red light was placed upon the coal pile on the first night. The next afternoon one of Rosenblatt's men took a red lantern to Mrs. Swenson, who said she would see that it was lighted and placed upon the pile of coal that night. This was not done until after the accident. Plaintiff was driving a Ford automobile with the top down, occupying the front seat. There were two women in the back seat. He drove from the north into Hawthorne avenue a short distance west of the place of the accident, and turned eastward on that street. He testifies that he was driving about 10 miles an hour, and that it was very dark on the street.

There is some evidence that, not only was there a pile of coal near the north curb, but lumps of coal were

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scattered at intervals from the north to the south curb of the street. The paved portion of the street is 20 feet in width. Plaintiff testifies that, as he drove along, the first he knew was a sudden jerk, then he felt himself going out of the car, but was unable to tell where he lit. He was found by a man, who heard the crash, lying close to the north curb of the street a few feet east of the coal pile. The automobile was lying on its left side, facing northward on the east side of the east coal pile, with the right front wheel broken and the engine still running. The women were thrown out toward the south, or at least, when first seen, were southward of the car near the south side of the street.

There was evidence on the part of defendants that there were some scratches, or marks, on the curb at the south side of the street a little west of the coal pile, and that some broken spokes from the wheel were found not very far from that point. Defendants insist that the physical facts in evidence conclusively establish that the plaintiff so carelessly drove his car against this curb as to smash the wheel, and as a result the car was diverted across the street to the position where it was found on the coal pile. We consider, however, that the determination of the question whether the car struck the south curb, which collision caused its collapse, or whether it struck a lump of coal in the street, or the coal pile on the north side of the street, was a question for the jury, and that, in the state of the evidence, the conclusion drawn by them from the testimony should not be disturbed by a reviewing court. While each of the defendants attempts to establish his freedom from negligence, we think the facts are sufficient to support the verdict for damages in favor of the plaintiff against both of them. It was negligence on the part of Rosenblatt to unload the coal in the public street and leave it without a danger signal at night. Proper precautions were taken by him the first night, but the second night he relied upon Mrs. Swenson to perform this duty, and for her negligence he is liable. It is true

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she denies the testimony of Rosenblatt's witnesses, but the jury accepted their version of the facts. It was within the knowledge of defendant Swenson that the coal he had ordered had been unloaded on the street in front of his premises. Mrs. Swenson had at least apparent authority to direct the men delivering the coal as to what should be done with it, when the bins were not ready. She directed that it be placed in the street, and Swenson, having knowledge that the coal in process of delivery to him was lying in the street, took no steps to warn travelers upon the highway, or to protect them from danger incident to the coal being in such a position. The jury were warranted in finding that the accident resulted from the joint negligence of defendants.

A question arises from circumstances which happened at the trial. The jury first returned a verdict against Swenson for \$5,000, and against Rosenblatt for \$2,500. The court refused to receive this verdict, and instructed the jury as follows:

"Your verdict is not in proper form, in that it attempts to assess damages in different amounts against the two defendants. You should simply find the amount of plaintiff's damages and insert the same at the proper place in the form of verdict if you find for the plaintiff. Another form of verdict is submitted, which you will have your foreman sign after filling in the amount of damages, if any you find."

After further consideration by the jury, a verdict was returned against both defendants for \$7,500. At the hearing, upon a motion for a new trial, it was ordered that the same should be allowed, unless defendants filed a remittitur of \$1,500. This was done, and a judgment for \$6,000 rendered. Rosenblatt now presents the proceedings taken in connection with the receipt of the verdict as one of the errors assigned. His argument is that the powers of the court with reference to the rendition of a verdict are limited and circumscribed by the provisions of section 7862, Rev. St. 1913 (Comp. St. 1922, sec. 8806),

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and that when the first verdict came in plaintiff should either have been required to elect to take judgment against one defendant on the verdict, with the right to dismiss without prejudice as to the other, or at most judgment should have been rendered on the verdict in accordance with the terms. This section applies to the condition arising when a juror dissents when the jury is being polled, and does not deprive the court of any of its former powers.

It is pointed out in *Nashville Railway & Light Co. v. Trawick*, 118 Tenn. 273, 10 L. R. A. n. s. 191, and in the annotation to the case, that the practice of the courts has not been uniform with respect to a situation where the jury has undertaken to apportion the damages between joint tort-feasors.

In some of the states where the courts have passed upon this question, punitive damages are allowed, and in some cases in such states it is held that, where one defendant has been guilty of an aggravated trespass, or tort, and the wrongful act of another has not been accompanied with malice or wanton disregard of the rights of the injured party, the verdict should be set aside and a new trial awarded. In other states, where punitive damages are not allowed, it is usually held that the judgment against all should be for the higher sum stated in the verdict, since that is the amount of damages plaintiff has been found to have sustained. In this state, where punitive damages are not allowed, a new trial would in ordinary cases be unnecessary.

In *Halsey v. Woodruff*, 26 Pick. (Mass.) 555, a verdict of \$75 was rendered against Halsey, and a separate verdict of \$2 against Avery. The court rendered judgment against both for \$75 and costs, saying:

"The result of the authorities, which are numerous, is that, where a joint action is brought against two for a trespass done, and there is a judgment against both, it must be a judgment for joint damages. All the legal consequences of there being a joint judgment must neces-

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sarily follow; one of which is, that each is liable for all the damage which the plaintiff has sustained by such trespass, without regard to different degrees or shades of guilt."

In *Beal v. Finch*, 11 N. Y. 128, it was held, citing *Halsey v. Woodruff*, *supra*, that each defendant was liable for all damages sustained without regard to shades of guilt. See 2 Viner's Abr. 303.

In *Fuller v. Chamberlain*, 11 Met. (Mass.) 503, a joint action of trespass was brought against five persons. A verdict was rendered on one count assessing the damages against three defendants "at the sum of seven dollars and eighty-three cents each, \$23.49." The judge informed the jury that the damages must be joint, and directed a verdict to be drawn up in the proper form for the aggregate sum of \$23.49 on the third count against the three defendants named in the verdict. The defendants moved in arrest of judgment because the verdict on the third count should be for the sum of \$7.83, and no more. The court said:

"The paper sealed up by the jury was not technically a verdict. Such a paper is not a verdict till it is affirmed and recorded. * * * When the sealed paper was opened, it was rightly explained to the jury, by the judge, that the law required joint damages. They had already found that the plaintiff ought to receive for his indemnity \$23.49, the aggregate of the three several sums. They adopted the amendment (not having been discharged), unanimously affirmed it as their verdict, and authorized it to be so recorded."

In the case at bar the jury attempted to do what they had no power to do, apportion the damages between the wrongdoers. On this fact being properly called to their attention, they corrected the verdict, which they had a right to do. The trial court, in calling the attention of the jury to the defect in the verdict and affording them an opportunity to correct the same before ending their deliberations, adopted a simple, practical and legal method. The instructions clearly present all the issues in the case,

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including contributory negligence on the part of plaintiff. We find no error.

AFFIRMED.

FRANZ SCHRAMM, PLAINTIFF: EDWARD G. MUELLER, ADMINISTRATOR, APPELLEE, v. WILBER CASEY, APPELLANT.

Filed April 21, 1923. No. 22291.

1. **Master and Servant:** APPLIANCES. A master is required to exercise ordinary care to provide reasonably safe appliances for servants, but is not necessarily required as a matter of law to furnish safe appliances.
2. ———: ———: INSTRUCTIONS. In an action by a servant to recover damages caused by the negligence of his master in knowingly furnishing, without sufficient warning, a vicious team having a propensity to frighten at motor vehicles and to run away, it may be reversible error to instruct the jury that it was the duty of the master as a matter of law to furnish a safe team.
3. **Trial:** INSTRUCTIONS. A correct instruction at variance with another instruction misstating the law and discrediting a defense interposed by a defeated defendant does not cure the error.

APPEAL from the district court for Morrill county:
RALPH W. HOBART, JUDGE. *Reversed.*

Williams, Hurd & Neighbors, for appellant.

Hastings, Ritchie, Canaday & Mantz, contra.

Heard before MORRISSEY, C. J., ROSE, DEAN, DAY and GOOD, JJ.

ROSE, J.

This is an action to recover damages in the sum of \$10,000 for negligence resulting in personal injuries. Plaintiff, 71 years of age, was employed by defendant to haul a load of lumber from Bayard to his employer's farm, a distance of a few miles. The employment required plaintiff to use a team and a wagon owned and furnished by defendant. Plaintiff delivered the lumber at the place designated; but, while returning astride the coupling on the running gears of the empty wagon, the team took fright at a gasoline tractor on the road,

ran away, threw plaintiff under the wheels and severely injured him. The negligence imputed to defendant seems to be that of knowingly furnishing to plaintiff, without sufficient warning, a vicious team having a propensity to frighten at motor vehicles and to run away, plaintiff himself having no such knowledge. The employment, service and injuries are not in dispute, but defendant in his answer denied negligence on his part and pleaded negligence of plaintiff as the cause of his injuries. Defendant also pleaded warning of danger and assumption of risk. Upon a trial of the issues the jury rendered a verdict in favor of plaintiff for \$600. Defendant has appealed from a judgment thereon.

It is contended that there was no evidence to sustain a verdict in favor of plaintiff, but the pleadings and proofs nevertheless presented issues of fact for the determination of the jury. The judgment, however, must be reversed for the giving of the following erroneous instruction:

"The defendant has admitted that the plaintiff was in his employ when the runaway complained of occurred. This fact creates the legal relationship of master and servant between the defendant and the plaintiff; and it is a fundamental rule of law that, in such a relationship, the master is to furnish the servant with such appliances (in this case a safe team and wagon) as are suitable and may be used with safety; and if the servant is injured by reason of defective appliances, placed in his hands by the master, the master will be liable unless he can clearly show that he has used ordinary care and diligence in the selection of the same."

The error consists in what practically amounts to an instruction that it was the duty of defendant to furnish "a safe team and wagon." The law is that a master is required to exercise ordinary care to provide reasonably safe appliances for his servants. *Vanderpool v. Partridge*, 79 Neb. 165. Defendant tries to justify the giving of this instruction under the first paragraph of the syllabus in

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Leigh v. Omaha Street R. Co., 36 Neb. 131, as follows:

"It is the duty of a master to furnish his servants with such appliances for his work as are suitable and may be used with safety; and if the servant is injured by reason of defective appliances furnished by his master, the latter will be liable for damages unless he can show that he has used due care in the selection of the same."

The difference between the two statements of the law is obvious. One requires a master "to furnish his servants with such appliances for his work as are suitable and may be used with safety," while the jury may infer from the other that it was the duty of defendant to furnish "a safe team and wagon."

In the argument of plaintiff reference is made to another instruction to the effect that an employer is not the insurer of his employee, but this does not cure the error. It is not shown that it was harmless. On the contrary prejudice is evident. Defendant in his testimony recognized danger in driving the team, but he offered proof that plaintiff, knowing the hazard, assumed the risk. The instruction to the effect that it was the duty of defendant to furnish "a safe team and wagon" not only misstated the law but discredited the defense of assumption of risk—an issue on which the evidence was conflicting. The inference of prejudice seems unavoidable. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

GEORGE CRAWFORD ET AL., APPELLANTS, V. E. B. WEEKS
SEED COMPANY, APPELLEE.

FILED APRIL 21, 1923. No. 22327.

1. **Sales:** SALE BY SAMPLE: IMPLIED WARRANTY. It is a general rule of law that a sale of goods by sample expresses or implies a warranty or condition that the bulk corresponds to the sample in kind and quality.
2. **Trial:** INSTRUCTIONS. It is error to submit to the jury for their

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determination a question as to the existence of a material fact pleaded by both parties to the action.

3. **Sales:** INSTRUCTIONS: FACTS ADMITTED. In an action to recover damages for breach of warranty in the sale of pop-corn, where a sale by sample is pleaded by both plaintiff and defendant, it is error to instruct the jury that the mere fact that a sample was produced at the sale does not mean an absolute warranty that the bulk equals the sample in kind, quality and general fitness, if the evidence does not warrant an inference that those terms were changed, waived or abandoned.
4. **Appeal:** REVERSAL. The giving of an erroneous instruction prejudicial to the party defeated is a ground of reversal upon appeal.

APPEAL from the district court for Valley county:
BAYARD H. PAINE, JUDGE. *Reversed.*

O. A. Abbott and Bert M. Hardenbrook, for appellants.

Munn & Norman, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and DAY,
JJ.

ROSE, J.

This is an action to recover damages for fraud and breach of warranty in the sale of 46,669 pounds of white-rice pop-corn in the Pacific Commercial Warehouse, Los Angeles, California, March 13, 1920. Plaintiffs were the buyers and paid the purchase price, \$2,916.81, April 15, 1920. Plaintiffs pleaded in their petition that the pop-corn was purchased by sample with a warranty of kind and quality for commercial popping purposes and that the bulk did not correspond to the sample; that it was worthless for the purposes purchased; that plaintiffs, without knowledge of the condition of the bulk, were induced by the fraudulent representations of defendant and its warranty, upon which they relied, to make the purchase; that they accepted the pop-corn and paid for it without inspecting it and without an opportunity to do so; that upon discovering the fraud and the breach of warranty they resold the bulk for feed and received from that source net proceeds aggregating \$1,324.83. Allowing

credit for this sum, the claim of plaintiffs, including loss of profits, amounts to \$2,421.62. Defendant denied the charges of fraud, admitted the sale by sample, and pleaded that the bulk corresponded to the sample in kind and quality. Upon a trial of the issues the jury rendered a verdict in favor of defendant. From a judgment of dismissal plaintiffs have appealed.

A reversal is sought on the ground that the trial court erred in instructing the jury. One of the instructions contained this charge:

"You are instructed that one of the material matters for you to decide in this case is as to whether the seller warranted the goods sold."

Another instruction was in this form:

"You are instructed that, if a sample is produced by the seller to the buyer, there is an implied warranty that the goods sold shall be equal in kind and quality and general fitness with the sample produced. The mere fact that a sample was produced at the sale does not mean an absolute warranty as to these elements, if the bulk of the goods were there and open to the inspection of the buyer; nor unless the jury should find that the parties actually contracted with reference to the sample produced and in reliance thereon."

Errors in these instructions are obvious. In both the petition and the answer there is a plea that the sale was by sample. The general rule of law is that a sale by sample expresses or implies a warranty or condition that the bulk corresponds in kind and quality to the sample. The existence of a warranty, therefore, was not a question for the jury and should not have been submitted to them. To permit them to find there was no warranty was to authorize a verdict that the sale was not by sample—the contradiction of a fact pleaded by both parties.

In permitting defendant to escape the consequences of an "absolute warranty" that the bulk "in kind and quality and general fitness" was equal to the sample, if

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the goods were open to the inspection of plaintiffs at the sale, the instruction was not applicable to the evidence. For commercial popping purposes the corn was raised in Valley county, Nebraska, shipped to Los Angeles and there sold to plaintiffs while stored in a warehouse. There is evidence tending to show these facts: It requires an expert to determine by inspection the popping quality of corn, and plaintiffs were not qualified as such. When the sale was made and when the purchase price was paid the bulk was in the warehouse. Therein plaintiffs were prevented from making an inspection. The popping quality for commercial use had been destroyed by heating before plaintiffs made their purchase. The bulk was not equal to the sample. Transfer of title and possession was effected by means of a warehouse receipt. These are not intended as findings but as mere statements of facts of which there is proof. There does not seem to be any foundation for an inference that the terms of the warranty were changed or waived or abandoned. In material respects, therefore, the instructions were erroneous.

The jury were long in deliberation and only agreed upon their verdict after an appeal to do so had been made in the form of an additional instruction from the bench. There seems to be no way to escape the conviction that the errors were prejudicial to plaintiffs.

REVERSED AND REMANDED.

ALBERT MARES, APPELLANT, V. HENRY CHALOUPKA,
APPELLEE.

FILED APRIL 21, 1923. No. 22263.

1. **Appeal:** REVERSAL. When it appears in an action for personal injuries that a verdict is apparently the result of passion and prejudice and is inadequate, such verdict will be set aside and a new trial will be granted.
2. **Negligence:** INSTRUCTIONS. In a personal injury action, when there is evidence tending to show contributory negligence on the plain-

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tiff's part, the jury should be instructed, under section 8834, Comp. St. 1922, on the question of comparative negligence.

APPEAL from the district court for Saline county:
LEONARD W. COLBY, JUDGE. Reversed.

Crofoot, Fraser, Connolly & Stryker and B. V. Kohout,
for appellant.

Bartos & Bartos and Grant G. Martin, contra.

Heard before MORRISSEY, C. J., LETTON, ALDRICH and
DEAN, JJ., RAPER, District Judge.

DEAN, J.

Plaintiff recovered a verdict and judgment for \$540 in an action for personal injuries growing out of a collision between defendant's car and a two-wheeled cart or sulky, in which he was riding on Main street in Wilber. Alleging inadequacy of the verdict, plaintiff appealed.

With respect to plaintiff's injuries a physician testified that there was "a compound fracture of the head of the big bone" and that a bone "about one inch at the top and an inch at the base" was removed; that they used "a drainage tube and put on splints," and that the Carrol-Daykin system of irrigation was used for a little more than two days; that the splints were not removed for about a month and that plaintiff was confined to his bed between four and five weeks; that he walked with crutches for about three months and afterward he used a cane; that he had "a partial stiffness of the knee" and that he did not know whether that would be permanent. The doctor said he did not render a bill, but that his charge was \$250, and that it was reasonable.

Another physician who attended plaintiff for a part of the time corroborated the evidence of the doctor whose evidence has just been reviewed. He added, however, that the removal of the bone would cause a retarding of the motion in plaintiff's knee which would, in his opinion, be permanent. He testified that his charges were \$100 and that they were reasonable.

Plaintiff alleged that all of his expenses amounted to \$540, which, as hereinbefore noted, was the amount of the jury's verdict. The expenses, as itemized in his petition, were "expenses in connection with said accident in the sum of \$350 for doctor's services, \$25 nurse's expenses and compensation, \$20 for repair of cart, \$20 repair of harness and \$125 for care of his horse during his confinement."

Only one question is presented, namely, is the verdict adequate in view of the fact that defendant's negligence was established by the verdict? He did not prosecute a cross-appeal. Had the jury believed defendant was not guilty of negligence the verdict should have been in his favor. But having found for plaintiff, and by its verdict having declared that defendant was negligent, it became the duty of the jury to assess compensatory damages in some amount. It did not do so. The verdict awarded the exact amount which plaintiff alleged in his petition he was obligated to pay for medical services, hospital attendance, and other expenses. Nothing appears to have been awarded for his injuries, which may be permanent, nor for pain and suffering which he endured, nor for loss of employment. Nor did the jury appear to consider the fact that his income was about \$1,000 a year.

The record does not present a case where some unforeseen emergency occurred which naturally overpowered the judgment of defendant so that for a time he was rendered incapable of promptly intelligent action. The night was misty. The windshield was covered with moisture. It was difficult to see ahead. Under all the circumstances he should have stopped when he suddenly came upon the standing cart immediately before him. We think the verdict is inadequate and must have been rendered under the influence of passion and prejudice. *Ellsworth v. City of Fairbury*, 41 Neb. 881; 29 Cyc. 847, 848.

Notwithstanding there is a good deal of conflict in

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the evidence, we conclude that plaintiff, in view of the record, should have a new trial. When the case is tried again the jury should be instructed on the question of comparative negligence upon which there was no instruction in the former trial.

The judgment is vacated and a new trial ordered.

REVERSED AND REMANDED.

NATHAN FINEGOLD, APPELLANT, v. UNION OUTFITTING
COMPANY ET AL., APPELLEES.

FILED APRIL 21, 1923. No. 22267.

1. **Property: OWNERSHIP: PRESUMPTION.** The presumption of the continuance of facts once shown to exist may, in a proper case, be applied in respect of the ownership or possession of property.
2. **Pleading: ESTOPPEL.** When a party alleges a material fact, in a pleading upon which he relies, he cannot afterward be heard to deny the existence of such fact.
3. **Property: OWNERSHIP: PRESUMPTION.** Possession of a vehicle which by negligent management has caused injury to the person or to the property of another warrants an inference of ownership, and, *prima facie* ownership having been found once to exist, the general rule is that it is presumed to continue until a change in ownership is affirmatively shown by the defendant.
4. **Master and Servant: AGENCY: BURDEN OF PROOF.** The presumption of the use and control of a motor propelled vehicle, which arises from proof of ownership, which by its negligent operation has inflicted damage upon the person or property of another, is not conclusive, but such facts place the burden upon the owner to show that the driver was not his agent nor in his employ.
5. **Evidence: ADMISSIONS: ADMISSIBILITY.** In a personal injury action the court may, in the exercise of sound judicial discretion, admit evidence of a conversation offered by plaintiff to show an admission by defendant's credit manager, since deceased, who was in charge of defendant's office, that an employee of defendant was sent by him on an errand, it being alleged that while in performance of the errand the employee inflicted the injuries complained of by colliding with plaintiff while such employee was operating a motor-cycle.
6. ———: **INFERENCES.** "In a civil action, when a fact may be fairly and reasonably inferred from other and all the facts and cir-

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circumstances proved, it may be taken as established." *Chicago, B. & Q. R. Co. v. Hildebrand*, 42 Neb. 33.

7. **Trial:** DISMISSAL: REVIEW. The evidence examined, and *held* that the court erred in sustaining defendant's motion to dismiss plaintiff's action.

APPEAL from the district court for Douglas county:
JAMES FITZGERALD, JUDGE. *Reversed.*

R. J. Craren and Richard S. Horton, for appellant.

Lambert, Shotwell & Shotwell and Kennedy, Holland, DeLacy & McLaughlin, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and DEAN, JJ., RAPER, District Judge.

DEAN, J.

Plaintiff sued in Douglas county to recover damages from the Union Outfitting Company, a corporation, and William Bell, its alleged employee, defendants, in the sum of \$50,000 for personal injuries sustained by plaintiff in Omaha, June 23, 1919, by being run over by a motorcycle, the alleged property of defendant company, which was propelled by its codefendant William Bell while in the performance, as alleged, of certain duties delegated to him by the company. When plaintiff rested both defendants moved separately for a directed verdict on the ground that the evidence was not sufficient to sustain a cause of action. Both motions were sustained, the jury were discharged, the suits were dismissed as to both defendants at plaintiff's costs, and he appealed.

Plaintiff alleged that he had just alighted from a street car when the collision occurred. In substance he testified that he was 36 years of age, by occupation a merchant tailor, and that his income averaged about \$600 a month. In respect of the facts immediately attending the accident he testified in part:

"My hip was knocked out, what they call the—I don't know what they call it; the hip was knocked out in front there, and my head was split here. My nose was knocked over, I was all bruised up, and it was gone out

here. My nose was very split here; and my head was split in two places; and then I was paralyzed about over nine months. I can't hear, I can't do anything. I was laying all summer six or eight, not being able to move to make one step, not even on crutches to walk. I know my head gets dizzy; * * * when I bend, or anything, I can fall in the street without knowing anything, right now. I say I got numbness that was there. I can't do anything when I bend at all, I am liable to fall and not know anything."

Plaintiff's evidence with respect to his injuries was in large part corroborated by his physician who testified that his patient sustained "a dislocation of the left hip; a crushing fracture in the fourth lumbar vertebra;" that he was partially paralyzed and that his spinal injury was permanent; that he treated him seven or eight months, and that at the time of the trial he was unable to do any work. In consequence of his injuries plaintiff was confined in a hospital for a considerable period and was in a plaster cast more than four months. The nature of the injuries are in part outlined here merely to show that the questions of fact disclosed by the record are properly for the consideration of the jury.

The contention in part is that, because of the absence of a safety zone at the place of the accident, the rider of the motorcycle violated a city ordinance in failing to stop while the street car was discharging passengers, it being stipulated that a city ordinance of Omaha so provided. The stipulation follows: "Mr. Horton: It is admitted by the parties hereto that under the ordinances of the city of Omaha, Douglas county, Nebraska, it is provided that all motor vehicles, including motorcycles, should stop when street cars are loading or unloading. When safety zones are established, they should pass only with utmost caution, and at a speed of not to exceed 12 miles per hour. Mr. DeLacy: I understand that is the ordinance; that is, they don't have to stop at safety zones; in the case of safety zones, they do not have to stop.

Mr. Horton: This is outside of safety zones. Mr. Shotwell: Yes. Mr. Horton: There were no safety zones. Mr. DeLacy: No; there weren't any safety zones in 1919. Mr. Horton: Let us admit that there was no safety zone at the intersection of Sixteenth and Webster at the time of the accident. There was a safety zone so far as you are concerned, but not as far as Mr. DeLacy is concerned. Mr. Shotwell: I do not want to make admission that there was not, if it is a fact that there was there; that is the only question. You are asking us to put in zones; and, if there is no safety zone, that is all, as far as that is concerned."

It is argued by the company that there is no proof that the motorcycle was its property or under its control at the time. With respect to ownership the following colloquy took place between the respective counsel for plaintiff and the outfitting company: "Mr. Horton: Do you admit that the Union Outfitting Company, on the 6th day of January, 1919, had a license number 3937 on a motorcycle owned by them? Mr. DeLacy: I will admit that, up to January 15, 1919, they owned a motorcycle, and it was duly registered; and I looked up the register the other day, and I do not remember what the number was; if you have the number there. Mr. Horton: Subject to correction, then, you admit that the license number taken out on the 6th day of January, 1919, was No. 3937, on the car owned by you at the time the license was taken out? Mr. DeLacy: Yes." Besides the foregoing there is evidence tending to prove that license number 3937 was at the time on the motorcycle which ran over plaintiff

The facts before us seem to make out a case of *prima facie* ownership sufficient to submit to the jury and which could be overcome only by direct proof to the contrary. The presumption of the continuance of facts once shown to exist may, in a proper case, be applied in respect of the ownership or possession of property. 16 Cyc. 1053. Possession of a vehicle which by negligent management has caused injury to the person or to the property of another

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warrants an inference of ownership and, ownership having been found once to exist, the general rule is that it is presumed to continue until a change in ownership is affirmatively shown by the defendant. *Carr v. King & Tomlinson*, 184 Ia. 734; *O'Malley v. Heman Construction Co.*, 255 Mo. 386. To substantially the same effect are the following: *Hatter v. Dodge Bros.* 202 Mich. 97; *Dennery v. Great Atlantic & Pacific Tea Co.*, 82 N. J. Law, 517; *Edgeworth v. Wood*, 58 N. J. Law, 463. The presumption is not of course conclusive, but such facts place the burden upon the owner to show that the driver was not his agent nor in his employ. *Norris v. Kohler*, 41 N. Y. 42; *Joyce v. Capel*, 34 Eng. C. L. Rep. 785; *Ferris v. Sterling*, 214 N. Y. 249; *Baker v. Maseeh*, 20 Ariz. 201; *Williams v. Ludwig Floral Co.*, 252 Pa. St. 141; *Knust v. Bullock*, 59 Wash. 141.

In the briefs of both defendants it is argued that there is no evidence which identifies Bell as the rider of the motorcycle. But in the answer of the Union Outfitting Company it is alleged that "William Bell was riding on said motorcycle * * * for his own convenience and pleasure and * * * that at the time of said accident the said William Bell was not acting as its agent, servant or employee." From this, and the proofs as well, the question of the identity of the rider of the motorcycle seems to have been sufficiently established so far at least as that question may affect the company. Whether Bell was the owner of the motorcycle or whether, as owner or otherwise, he was in the company's employ or under its direction at the time are questions of fact for the jury.

James Sullivan, a railroad employee, arrived at the scene of the accident just after it happened. He testified: "Q. Did you see Mr. Finegold there? A. Mr. Finegold was laying in the street. Q. Did you notice the defendant Bell here? A. They were carrying him in the drug store, taking him in the drug store, at Sixteenth and Webster. I don't know him to see him, now."

Clearly the witness was inquired of about Mr. Bell. But because plaintiff was carried into the drug store and because there is no other evidence tending to show that Bell was carried into the drug store and because the witness added, "I don't know him to see him, now," defendants contend that the answer of the witness referred to plaintiff. While Sullivan's evidence seems to be incomplete it is not improbable, in view of plaintiff's subsequent condition, that the collision was such that the rider of the motorcycle also needed assistance and that he was carried into the drug store as Sullivan testified. Anyhow it was not a question of law for the court, but was a question of fact for the jury, to be considered, with respect to its probative value, with all the evidence in the case.

It is elementary that evidence in respect of a material fact from which fair-minded persons might reach different conclusions, when the evidence is considered in its entirety, does not present a question of law for the court, but a question of fact for the jury, which should be submitted under appropriate instructions.

With respect to the alleged liability of the company plaintiff testified that soon after he went to the hospital a man called on him who introduced himself as Mr. Hall. A photograph was introduced in evidence, which is not in the record, which he identified as the same person who called on him. Elsewhere in the record the photograph was identified as being that of Mr. Hall, and there is the evidence of an employee of the defendant company, a buyer and assistant manager of the store for 10 years, who testified that Mr. Hall, since deceased, was and for many years had been in charge of the office and was the credit manager of the company at the time. When counsel asked plaintiff to relate the conversation between Mr. Hall and himself, which took place at the hospital, defendant's objection to the introduction of his evidence on that point was sustained. Counsel then made this offer, which was denied: "The plaintiff offers to prove that the

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answer of the witness would be that Mr. Hall stated that he was very sorry the accident had occurred; that he had sent Mr. Bell out on an errand that morning; that, as soon as Mr. Finegold had recovered sufficiently to come down to the store, the matter would be satisfactorily settled; that any damage by virtue of the accident was covered by indemnity insurance, and he would see that an adjustment was properly made."

Mrs. Harry Filmore, an acquaintance of plaintiff, testified that she was on the same street car on which plaintiff came down town the morning of the accident and that she saw him get off the car and saw the motorcycle run over him. She also identified Mr. Hall's photograph and said that she saw him at the hospital and heard a conversation about the accident between him and plaintiff. When asked to relate the conversation the defendant company's exception was sustained. Plaintiff then made this offer of proof: "The plaintiff offers to prove and states the answer of the witness would be that Mr. Hall stated that their company was insured against such accidents; that he was very sorry it had happened; that he had sent Mr. Bell out on an errand early in the morning of the day of the accident; and that, as soon as Mr. Finegold had recovered sufficiently, the damage occasioned by the accident would be satisfactorily settled, when he had sufficiently recovered, if he would call at the store; and that, while Mr. Bell was on the errand referred to, the accident complained of occurred." The offer of proof was denied.

We think it was an abuse of sound judicial discretion for the court to exclude that part of plaintiff's evidence which purports to show that Mr. Hall said he "had sent Mr. Bell out on an errand that morning," and also that part of Mrs. Filmore's evidence wherein she testified that she heard Mr. Hall say "that he had sent Mr. Bell out on an errand early in the morning of the day of the accident." The evidence should have been submitted to the jury, under an appropriate instruction, in connection

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with the other facts in the case. Whether Mr. Hall had authority to bind the company by an admission of liability we cannot decide in the present state of the record.

It seems that the rule announced in *Chicago, B. & Q. R. Co. v. Hildebrand*, 42 Neb. 33, is applicable to the facts here: "In a civil action, when a fact may be fairly and reasonably inferred from other and all the facts and circumstances proved, it may be taken as established." We think the evidence is *prima facie* sufficient to take the case out of the rule announced in *Neff v. Brandeis*, 91 Neb. 11, and *Weber v. Thompson-Belden & Co.* 105 Neb. 606, cited by defendants. The court erred in directing a verdict for defendants. The judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

E. E. FIKE, RECEIVER, APPELLEE, v. RAY A. LOWER ET AL.,
APPELLANTS.

FILED APRIL 21, 1923. No. 22335.

1. **Mortgages:** DEED AS SECURITY. A deed absolute on its face, when given as security for a debt, will be held to be a mortgage.
2. **Evidence** examined, and held to sustain the findings and judgment of the trial court.

APPEAL from the district court for Saunders county:
GEORGE F. CORCORAN, JUDGE. *Affirmed.*

Jamieson, O'Sullivan & Southard, for appellants.

Stewart, Perry & Stewart and *Robert Van Pelt*, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN and DAY,
JJ.

DAY, J.

This action was brought by E. E. Fike as receiver of the Valparaiso State Bank, hereinafter referred to as the bank, against Ray A. Lower, Zetta Lower, his wife, and William C. Elmelund. The purpose of the action was to have a certain warranty deed to lots 1 and 2, in

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block 12, in the village of Valparaiso, executed by Ray A. Lower and his wife, Zetta Lower, on October 24, 1919, to William C. Elmelund, and by the latter by quitclaim deeded to the bank, declared to be a mortgage in favor of the bank; that an accounting be taken of the amount owing by Ray A. Lower to the bank; and that the deed, if found to be a mortgage, be foreclosed.

Ray A. Lower admitted in his answer that he and his wife, Zetta Lower, executed a warranty deed conveying to said William C. Elmelund the property above described, and that the deed was filed for record November 12, 1919; that on the 20th day of September, 1919, for a valuable consideration he conveyed to Zetta Lower, his wife, the property above described, and that she thereby became vested with the title to said property; that on October 24, 1919, the said Zetta Lower entered into a contract with the said Elmelund, whereby he agreed to purchase the said lots for the sum of \$15,000, and that in pursuance of such agreement the deed of October 24, 1919, was signed by himself and said Zetta Lower; and that said Elmelund has failed to pay any part of the consideration for the deed.

Zetta Lower, in a cross-petition, alleged that on October 24, 1919, the lots above described were her separate and individual property, having been conveyed to her by Ray A. Lower, her husband, for a valuable consideration on September 20, 1919, and that the deed was recorded on May 18, 1920. She further alleged that on October 24, 1919, she sold the premises to William C. Elmelund for an agreed sum of \$15,000; that a deed was executed by her husband and herself to said Elmelund; that the consideration of \$15,000 was never paid by Elmelund; that the agreement to pay said sum on the part of Elmelund was not made in good faith, but for the purpose of wrongfully and deceitfully obtaining from her the title to said property, and of defrauding her out of the same; that after obtaining the title to the property the said Elmelund transferred the same to the

Valparaiso State Bank; that said bank was not a *bona fide* purchaser for value, and had notice and knowledge of her rights to said premises. She prayed that the deed of October 24, 1919, be canceled and held for naught; that the deed from Elmelund to the bank be also canceled, and that the title to said lots be quieted and confirmed in her.

Elmelund also filed a cross-petition, in which he claimed an interest in the lots subject to the claim of the bank thereto; but, as no appeal has been taken by him from an adverse judgment against his claim in his cross-petition, no notice need be taken thereof. With respect to the claim of the Lowers, the trial court found that the deed of October 24, 1919, was given in trust to secure an indebtedness due from Ray A. Lower to the bank; that Ray A. Lower owed the bank \$48,500; that the deed, while absolute on its face, was in fact a mortgage; and entered a decree foreclosing the said deed as a mortgage. From this judgment Ray A. Lower and Zetta Lower have appealed.

We first consider the evidence as bearing upon the transaction of October 24, 1919. The testimony on behalf of the plaintiff tended to show that at that time Ray A. Lower was largely indebted to the bank; that he had been its cashier and general manager, and had so conducted the affairs of the bank, and so juggled the entries in the books, that the true condition of the bank's affairs and of the amount of his indebtedness was difficult to ascertain. Interested parties were called in, as well as a representative of the department of trade and commerce, and it was agreed by Lower that he would transfer this property to Elmelund to protect the bank against loss by reason of his misconduct of the bank's affairs.

Elmelund's version of what occurred is that the property was to be transferred to him to protect the bank, as well as himself, from losses.

On the other hand; Lower and his wife both testified

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that the transfer of the property by them to Elmelund for \$15,000 was an out and out sale to Elmelund for that sum.

In view of all of the circumstances and the evidence upon this phase of the case, we are impressed that the plaintiff's version of the transaction is the true account, and that the transfer of the property was made to Elmelund in trust for the protection of the bank against loss arising by Lower's misconduct of the bank's affairs. It has frequently been held that a deed absolute on its face, when given as security for a debt, will be regarded as a mortgage.

With respect to the claim by Zetta Lower that on October 24, 1919, the property in question belonged to her individually, the testimony in her behalf tends to show that Ray A. Lower on September, 20, 1919, conveyed this property to her by deed, which deed was not recorded until May 18, 1920. Her claim is that marital difficulties had arisen between herself and her husband, culminating in a divorce proceeding instituted by her, and that in consideration of a dismissal of the divorce proceeding, and a reconciliation between the parties, Lower had deeded this property to her. In support of her contention a deed to the property, purporting to be dated September 15, 1919, and purporting to be acknowledged on September 20, 1919, was introduced in evidence. Testimony of other witnesses also tended to show that they had seen this deed in the possession of Mrs. Lower during the month of September. On the other hand, the notary public who took the acknowledgement testified that the deed from Lower to his wife was acknowledged on May 17, 1920, and dated back by Ray A. Lower. The evidence is clearly irreconcilable. In view of the entire record, however, we are convinced that the testimony of the notary public is true.

It is urged by the appellants that, in the accounting between Lower and the bank, it appears that he does not owe the bank anything. The testimony respecting

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the accounting is extremely complicated. It is apparent that the accounts have been juggled, transferred and falsified for the purpose of concealing the true state of the bank's affairs. One of the experts who examined the books and traced the entries from one bank to another concludes that Lower's personal indebtedness to the bank amounts to \$40,500. If interest were added to the several items comprising this sum of \$40,500 from the dates on which the indebtedness arose, it would equal or exceed the amount of the indebtedness which the court found Lower owed the bank.

Without discussing other features of the evidence, we have become convinced from an examination of the entire record that the judgment of the trial court is fully sustained, and that it should be affirmed.

AFFIRMED.

JOHN HARRIS ET AL., APPELLEES, V. CHARLES STEELE ET AL., APPELLANTS.

FILED APRIL 21, 1923. No. 23242.

Waters: IRRIGATION: INJUNCTION. Where a landowner, for the purpose of irrigation for the benefit of himself and others, diverts water from a river through lands of others without the latter's consent, or without procuring the right by condemnation proceedings, or without obtaining the consent in writing of a majority of the residents and landowners bordering on a stream or channel through which it is proposed to conduct the water as provided in section 8458, Comp. St. 1922, such landowner may be restrained by injunction from continuing the trespass, even though permission to divert the water from the river has been granted by the board of public works of the state.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

W. D. Oldham and W. E. Balcom, for appellants.

Sinclair & McDermott, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE, DAY and GOOD, JJ.

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DAY, J.

John Harris and others, plaintiffs, obtained a judgment in the district court for Buffalo county enjoining Charles Steele and others, defendants, from flowing water over and across the plaintiffs' lands; from building a ditch across plaintiffs' lands; and from otherwise trespassing thereon. From this judgment the defendants appeal.

It appears that on December 15, 1921, Charles Steele, one of the defendants, was granted the right by the department of public works of the state to divert five cubic feet of water per second from the main channel of the Platte river for irrigation purposes. Steele's application to the board recited that the lands intended to be irrigated were located in section 14, township 8, range 18, in Phelps county, and comprised a tract of about 380 acres, of which 80 acres were owned by Steele, and the balance by three others. His application also recited that it was proposed to locate the headgate on the south bank of the main channel of the Platte river where it intersects the southwest quarter of the southwest quarter of section 7, township 8, range 18, in Buffalo county. It thus appears that the lands proposed to be irrigated were some four miles distant from the headgate. The project contemplated that the water taken from the river was to be conducted from the intake over and across an old channel or stream connecting the main channel with the south channel for a distance of about a mile and a quarter, and thence along the south channel of the river to a point in section 15 where the water was to be diverted and conducted by canals to the lands proposed to be irrigated. The old channel or stream connecting the main channel with the south channel is referred to in the evidence as the "Harris channel." The testimony shows that the title to the bed of the Harris channel is in the plaintiffs. There is a direct conflict in the testimony as to whether in recent years any water has flowed through the Harris

channel, the testimony in behalf of the plaintiffs indicating that no water flowed through the Harris channel except when the water in the main channel of the river was at a high stage. On the other hand, the testimony of the defendants indicated that there was water in the Harris channel whenever there was any water flowing in the river. It appears that the plaintiff Harris had erected a dam at the mouth of the Harris channel to prevent the waters from flowing through it, and that the bed of the channel, which was about 300 feet wide and with no specially marked banks, was used for pasture and grazing. As we view it, however, the question whether there was flowing water in the Harris channel is entirely immaterial so far as it affects the present controversy.

It further appears that on August 2, 1922, the defendant Steele, in company with a number of his employees, also defendants, went upon the Harris land and offered to pay \$25 for permission to open the channel and divert the water from the river into it, which offer was refused by Harris. Defendants thereupon, without leave or permission from any of the plaintiffs, went upon the Harris land and with scrapers opened up a ditch along the Harris channel and diverted the waters from the river into the Harris channel and over and across the lands of the plaintiffs. While thus engaged, the present action was commenced and the defendants ceased work.

The answer of the defendants shows that prior to going upon the land the defendant Steele sought to obtain a right of way over the plaintiffs' lands by condemnation, but upon objection by the plaintiffs the county judge refused to appoint appraisers upon the ground that the project was purely a private enterprise. No appeal appears to have been taken from the order of the county judge, and the correctness of his ruling is not before us.

It also appears that no attempt was made by the defendants to comply with section 8458, Comp. St. 1922, which provides in substance that, before waters to be

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used for irrigation can be conducted into or along any of the natural streams or channels of the state, the consent in writing of the majority of residents and land-owners bordering upon such stream or channel must be obtained.

It seems clear that the defendants were upon the lands of the plaintiffs without any semblance of legal right, and were trespassers.

Defendants urge that they are financially responsible, and offer to pay any damages which the plaintiffs have sustained by reason of flowing the waters through the land; and that an injunction was not a proper remedy. We are unable to agree with this contention. The plaintiffs have the legal right to own and operate their lands free from the interference of others, in such manner as suits their own convenience or whims; and this right cannot be interfered with except in the manner provided by law. No person's land can be taken from him by another without his consent, upon the mere payment of damages, except in cases where the public interests require that it be done.

The flowing of the water over the plaintiffs' lands is a continuing trespass against which injunction is the proper remedy.

The judgment of the district court is right, and is
AFFIRMED.

PETER MANGOLD, APPELLEE, V. VERNE GRACE ET AL., APPELLANTS: SOUTHEAST QUARTER OF SECTION 7, TOWNSHIP 14, RANGE 11, DOUGLAS COUNTY, NEBRASKA, ET AL., APPELLEES.

FILED APRIL 21, 1923. No. 22343.

1. **Executors and Administrators: ADMINISTRATOR'S SALE: COLLATERAL ATTACK.** An administrator's sale of his decedent's real estate, pursuant to an order of the district court, is a judicial sale and is not subject to collateral attack for irregularities.
2. ———: ———: **IRREGULARITIES.** The filing in the district court by

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a foreign administrator of a certified copy of his appointment, instead of an authenticated copy, as required by section 1423, Comp. St. 1922, is but an irregularity which is cured by confirmation of sale.

3. ———: ———: ———. Failure of a foreign administrator to file in the district court an authenticated copy of his bond, as provided by section 1425, Comp. St. 1922, and the failure to give bond to the district judge, as provided by section 1426, Comp. St. 1922, are mere irregularities which are cured by confirmation of sale.
4. ———: ———: ———. Where an administrator has advertised lands of his decedent for sale, pursuant to an order of the district court, and offers the land for sale and receives bids but does not accept them, and adjourns the sale and later abandons it, his failure to report such attempted sale to the court is an irregularity that cannot affect a subsequent sale by the administrator, pursuant to a new notice of sale.
5. ———: ———: INADEQUACY OF PRICE. Mere inadequacy of price for which lands are sold by an administrator, pursuant to an order of the district court, cannot, after confirmation and in a collateral attack, be urged to defeat the sale.
6. ———: ———: IRREGULARITIES. Failure of purchaser at a sale of land by an administrator, pursuant to an order of the district court, to give a bond to the administrator to pay an existing incumbrance on the land, when the estate of the decedent is liable therefor, as provided by section 1422, Comp. St. 1922, is an irregularity that cannot be inquired into in a collateral attack upon the sale.
7. ———: ———: INCUMBRANCE: FAILURE TO PAY. Where a purchaser of real estate at an administrator's sale acquires land of a decedent that is incumbered by a mortgage for which the estate of decedent is liable, and fails to give to the administrator a bond for the payment of the incumbrance, as required by section 1422, Comp. St. 1922, and the administrator subsequently pays the mortgage out of the proceeds of the sale, and such purchaser later brings an action against the heirs of the decedent to quiet title to the land so acquired, equity will, as a condition to the granting of the relief demanded, require the purchaser to pay to defendants a sum equal to their interest in the fund used to discharge the mortgage, together with interest thereon from date of sale.

APPEAL from the district court for Douglas county:
ARTHUR C. WAKELEY, JUDGE. *Affirmed in part, and reversed in part.*

Will H. Thompson & Son, for appellants.

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William H. Herdman and O'Connor & O'Connor, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

GOOD, J.

This action involves the validity of a sale of real estate for payment of debts and costs of administration by a foreign administrator.

In 1903 Henry Schroeder, a citizen and resident of Wyoming, died intestate, leaving him surviving a widow and four children, whose ages ranged from two to eight years. At the time of his death he was possessed of real and personal property in Wyoming and also 160 acres of land in Douglas county, Nebraska, which is the subject of this controversy. Such proceedings were had in Wyoming that all of decedent's property in that state was applied toward the payment of the debts against his estate, and there still remained unpaid debts to the amount of \$4,834.52 and some costs of administration. The land in controversy was subject to a mortgage of about \$1,500, and the debt which it secured had been filed and allowed as a claim against decedent's estate in Wyoming. In 1905, on the petition of the administrator, license was granted by the district court for Douglas county to sell the land in controversy for the payment of the unpaid debts and costs. The land was advertised for sale and not sold for want of bidders; on readvertising bids were received, but, not being for a satisfactory sum, the sale was adjourned and abandoned. This attempted sale was not reported to the district court. The land was again advertised for sale and was purchased by the plaintiff for the sum of \$12,080. The sale was reported and confirmed and deed issued to the plaintiff. Plaintiff brought this action to quiet title on the ground of adverse possession. The defendants are the heirs of Henry Schroeder, deceased. They filed an answer and cross-petition in which they assault the administrator's sale

upon various grounds, and ask to have the sale set aside and title to the land quieted in themselves. The trial resulted in a decree quieting title in plaintiff upon condition that he pay into court for the defendants the sum of \$1,008.07, with interest thereon from the date of the administrator's sale. The defendants have appealed.

The widow of Schroeder consented to the sale of the real estate by the administrator, waiving her dower right in the land, but reserving to herself her right to dower in the proceeds of the sale. Subsequent to the sale she executed a quitclaim deed to the premises. The administrator, previous to granting of license, filed certified copies of his appointment and of his bond, as administrator, but did not file authenticated copies, as required by the statute. Although the administrator was licensed to sell more real estate than was necessary for the payment of debts, the district court for Douglas county did not require, nor did the administrator give, a bond to the district court, as required by section 1426, Comp. St. 1922. The notice of sale given by the administrator was for one day less than the period required by statute; nor did the district court require the purchaser to give a bond for the payment of the debt allowed against the decedent's estate, and which was secured by a mortgage on the land, as required by the statute; nor did the purchaser pay or satisfy the mortgage, and the debt which it secured was afterwards paid by the administrator out of the proceeds of the sale of the land.

Defendants urge that the sale should be set aside for the irregularities mentioned, and also for the reason that, as they allege, the bids were chilled because of the irregularities in the proceedings, and that the land did not bring an adequate and fair price, and that the administrator did not pay in the full purchase price of the land, in that he did not pay or discharge the mortgage upon the land in addition to the price bid.

1. Before entering upon a discussion of any of the questions involved in this case, it may be well to ob-

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serve that this is a collateral attack on an administrator's sale. This court has heretofore held that an administrator's sale of real estate of his decedent, pursuant to the order of a district court, is a judicial sale and is not subject to collateral attack for irregularities. *Maul v. Hellman*, 39 Neb. 322; *Seymour v. Ricketts*, 21 Neb. 240; *Haight v. Hayes*, 3 Neb. (Unof.) 587. Nearly if not all of the questions raised by the defendants have previously been settled by this court and been held to be irregularities and not to avoid the sale.

2. That the failure of a foreign administrator to file an authenticated copy of his appointment in the district court, as required by section 1423, Comp. St. 1922, is but an irregularity, is evident from the holding of this court in *Myers v. McGavock*, 39 Neb. 843. In that case a guardian's sale was attacked for failure of the guardian to file an authenticated copy of his appointment. The statutory requirement as to filing by a foreign guardian of an authenticated copy of appointment is the same as for a foreign administrator. In that case a certified copy instead of an authenticated copy was filed, as was done in the instant case.

3. That the failure to file in the district court an authenticated copy of the administrator's bond, given in the Wyoming court, and that no bond was given by the administrator to the district court for Douglas county are mere irregularities, has been determined by this court in *Pohlenz v. Panko*, 106 Neb. 156. The failure to publish notice for three full weeks prior to the date of the sale, as required by the statute, has likewise been held an irregularity, cured by confirmation, in *Pohlenz v. Panko*, *supra*, and cases there cited.

4. Complaint is made because the administrator failed to report to the district court the second attempted sale. Had the facts been reported, it could not have availed the defendants, for no bid was accepted and no sale was made, and the court could have done nothing more than to have ordered a readvertisement of the land

for sale. The failure to report the fact was, at most, an irregularity and could not have the effect of invalidating a sale subsequently made pursuant to a new notice.

5. Defendants assign as error that bids were chilled and a fair price could not be obtained by reason of the irregularities in the proceedings previous to the sale. Mere inadequacy of price cannot be urged after confirmation in a collateral attack. Besides, the district court in this proceeding found that the land sold for a fair price, and the finding is supported by the evidence.

6. Defendants urge that the sale was confirmed without payment of the full purchase price. The record shows that the bid was \$12,080, and this amount was paid in by the purchaser. The defendants evidently, by this assignment, have reference to the fact that plaintiff did not pay and discharge the mortgage debt upon the land. This was no part of the bid. It is true that, under the statute, the purchaser should have been required to give a bond to pay the debt secured by the mortgage, because it was a claim that had been allowed against the estate of the decedent, but there is no merit in the assignment that he did not pay the full purchase price; and in *In re Estate of Vasek*, 97 Neb. 617, it is held that the failure of the purchaser to give the bond is an irregularity that cannot be inquired into on a collateral attack upon the sale.

7. Defendants complain because the district court did not, as a condition to quieting title in the plaintiff, require him to pay the full amount of the mortgage debt existing against the land at the time of sale, together with interest thereon from the date of sale until entry of the decree in this action. It appears for some reason, which is not quite clear, that the district court required the plaintiff, as a condition to quieting title in him, to pay into court for the defendants but two-thirds of the amount of the mortgage debt, with interest from date of sale. In this there was error. Plaintiff brought this action in equity to quiet his title to the land. It is a

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familiar maxim that he who seeks equity must do equity. Under the statute, the administrator was required to sell the land, subject to existing incumbrance. When the plaintiff took title to the land at the administrator's sale, he should have given a bond for the payment of the debt secured by the mortgage, because the mortgage debt had been previously allowed as a claim against the estate of the decedent. This he did not do. The land, however, was subject to this mortgage, which was subsequently paid by the administrator out of the proceeds of the sale of the real estate. The plaintiff had the benefit of the sum so paid to discharge the mortgage. He should be required to reimburse the defendants for the amount of their funds which were used to discharge the mortgage. Under the law, then in force, the widow of decedent was entitled to a dower interest in the land of her deceased husband. This was a life estate in one-third thereof. The widow was entitled not to one-third of the fund used to discharge the mortgage but to a life use of one-third of the fund. The court should have determined her expectancy and should have ascertained the value of her life use of that fund, and this amount should have been deducted from the total amount required to pay the mortgage debt. The remaining sum would represent the interest of the defendants in this case, and the plaintiff should have been required to pay into court such sum, together with interest thereon from the date of sale.

This is the only error we have been able to discern which was committed by the district court. In all other respects the decree of the district court is affirmed. The judgment is reversed and the cause remanded, with directions to the district court to ascertain the value of the widow's life use in one-third of the fund required to discharge the mortgage upon the land, and to enter a decree requiring plaintiff, as a condition to quieting his title, to pay to the defendants the whole sum required to pay the mortgage debt, less the value of the widow's life use of one-third thereof, and such sum to bear interest from the date

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of sale to entry of decree, pursuant to the order of this court.

The judgment of the district court is affirmed in part and reversed in part and the cause remanded for further proceedings in accordance with this opinion.

JUDGMENT ACCORDINGLY.

WILLIAM E. BARKLEY, RECEIVER, APPELLEE, v. FRANK E. SCHAAF ET AL., APPELLANTS.

FILED APRIL 21, 1923. No. 22354.

Appeal: PARTIES. All parties to a cause tried in the district court who may be affected by the modification or reversal of the judgment must be made parties in the proceedings to review the said cause in the supreme court.

APPEAL from the district court for Lancaster county:
WILLIAM M. MORNING, JUDGE. *Appeal dismissed.*

Sterling F. Mutz, for appellants.

Good & Good, Boehmer & Boehmer and F. C. Foster,
contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and
GOOD JJ., BEGLEY, District Judge.

GOOD, J.

Plaintiff and appellee, as receiver of the Nebraska Hotel Company and of the Nebraska Building & Investment Company, brought this action against Frank E. Schaaf and his wife, Gertrude A., the National Bank of Commerce and others, claiming, in effect, that a fund of \$6,000 in the said National Bank of Commerce, and which was represented by a certificate of deposit and a cashier's check, issued by said bank and payable to Gertrude A. Schaaf, was the property of the Nebraska Hotel Company, and claiming that the defendants Schaaf and wife were seeking to wrongfully withdraw said fund from the bank and appropriate it to their own use. The defendants Schaaf and wife answered with a general denial.

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except that it was admitted that they were husband and wife, and later they filed an amended answer, in which they set up a judgment in another action which they claimed was an adjudication of the issues in this case. The plaintiff filed a reply which partakes of the nature of a supplemental petition, and in which it was admitted that a judgment had been obtained in favor of the Nebraska Hotel Company in another action against Schaaf, and asking that the money, represented by the certificate of deposit and cashier's check, be applied in part payment of that judgment. The record does not disclose the contents of the answers filed by the defendant National Bank of Commerce and the other defendants, but the decree of the district court shows that answers were filed by the said bank and other defendants.

Upon a trial of the case the court found that neither Schaaf nor his wife had any interest in the fund, and that the \$6,000, or the check and certificate of deposit representing the same, was the property of the Nebraska Hotel Company, and ordered the receiver to indorse the check and certificate of deposit, turn them over to the defendant National Bank of Commerce, and ordered the bank to pay the amount represented thereby into court, and directed the fund, when paid into court, to be applied as a partial payment on the judgment in the other action, which was referred to in the amended answer and reply. The defendants Frank E. Schaaf and wife alone have appealed, but they bring no other parties to the action into court on this appeal save the appellee, William E. Barkley, as receiver.

It is apparent from an examination of the record that the defendant National Bank of Commerce is vitally interested in this appeal, and that it has not been made a party thereto. The rule seems to be well established that all parties to a cause in the trial of a case in the district court who may be affected by the modification or reversal of the judgment must be made parties to the proceedings

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to review the said cause. *Richardson v. Thompson*, 59 Neb. 299, and cases there cited.

As the record discloses that at least one of the parties who might be injuriously affected by a reversal of the decree of the district court has not been made a party to this appeal, this court will not look into the merits of the decision, but the appeal will be dismissed because all of the parties who are necessary to a proper determination of the case are not before the court.

APPEAL DISMISSED.

CROWELL LUMBER & GRAIN COMPANY, APPELLEE, v. RYAN
COMPANY, APPELLANT: HERMAN HOLSTEN ET. AL.,
APPELLEES.

FILED APRIL 21, 1923. No. 22293.

1. **Mechanics' Lien:** STATEMENT. A mechanics' lien statement is sufficient if the itemized account of materials furnished or labor performed and the affidavit attached thereto, when construed together, comply with the statute.
2. ———: EVIDENCE. Where labor and materials are contracted for use in a proposed building and delivered in pursuance of such contract and used in erecting such building, which is completed, and the prices charged therefor are fair and reasonable, and there is no testimony tending to raise even a suspicion that the materials therefor were elsewhere obtained or that those contracted for were not used therein, the seller is entitled to a mechanic's lien therefor.

APPEAL from the district court for Dodge county:
FREDERICK W. BUTTON, JUDGE. *Affirmed as modified.*

Baldrige & Saxton, for appellant.

Montgomery, Hall & Young, Beach Hinman, Dolezal, Spear & Mapes, Joseph E. Daly and E. L. Mahlin, contra.

Heard before MORRISSEY, C. J., ROSE, DEAN, ALDRICH and GOOD JJ., BEGLEY, District Judge.

BEGLEY, District Judge.

Action by plaintiff, together with cross-petitions by various defendants, to foreclose mechanics' liens. From

a decree of foreclosure defendant Ryan Company has appealed.

Herman Holsten, defendant, was the record owner of certain lots in Dodge, Nebraska, and defendant Ryan Company and Geo. W. Ryan, were the owners under contract of purchase. On or about May 1, 1919, Ryan Company entered into a written contract with defendant August A. Wunderling, by the terms of which Wunderling was to superintend the construction of a building located on said premises, and Wunderling thereafter carried out said contract and erected said building. Plaintiff entered into a contract for the furnishing of lumber and materials and did furnish certain lumber and materials. Wunderling contracted, as agent for Ryan Company, with the other defendants to furnish labor, materials and fixtures for the building. Plaintiff and the other defendants, except Holsten, filed and recorded mechanics' liens for alleged unpaid balances due them. The court found there was due Herman Holsten an unpaid purchase price of \$1,809.49 and that same constituted a first lien upon the premises; that plaintiff and defendants were entitled to a lien upon said premises in the following amounts: To the plaintiff the sum of \$15,086.05; Wright Electrical Construction Company, \$875.62; Fremont Furnace and Metal Works, \$820.75; Ryland H. Fletcher, \$2,866.25; August A Wunderling \$3,866.24; J. C. Nitz, \$77.85, and that said parties were holders of mechanics' liens of equal priority and were entitled to a second lien on said premises.

The appellant alleges the liens, or some of them, are defective, in that they did not set out the dates when materials were furnished and that the prices charged therein were fair and reasonable. The affidavit and the account of items for materials furnished and labor performed, when construed together, substantially comply with the statutes. *Drexell v. Richards*, 50 Neb. 509. The reasonableness of the charges is a matter of evidence.

The next error alleged is that the evidence was insuf-

ficient to establish the liens. The evidence established that the labor and materials were contracted for use in the proposed building; that they were delivered in pursuance thereof and used in erecting the building, which was completed, and that the prices charged therefor were fair and reasonable. No evidence was offered by appellant to offset this, but on the contrary the contractor, who was its agent, testified to it as a fact. There was no testimony tending to raise even a suspicion that the materials therefor were elsewhere obtained or that those contracted for were not used therein. This proof was sufficient. *Seattle Lumber Co. v. Sweeney*, 43 Wash. 1; *Rice & Floyd v. Hodge Bros.*, 26 Kan. 164. There is one exception to this proof however. The electric light fixtures to the amount of \$421 contained in the lien of Wright Electrical Construction Company were not delivered at nor placed in the building, but were ordered withheld by the owner, and the fixtures are still held by Wright Electrical Construction Company. Under these circumstances we think the fixtures were not furnished within the purview of the statute and such item should be disallowed.

It is alleged by appellant that certain items were improperly allowed. Section 3207, Comp. St. 1922, provides:

“Any person who shall perform any labor or furnish any material or machinery or fixtures, including gas and electric apparatus and lighting fixtures, whether detachable or undetachable, for the construction or erection * * * of any * * * building * * * by virtue of a contract or agreement, expressed or implied, with the owner thereof or his agents, shall have a lien to secure the payment of the same upon such * * * building * * * and the lot of land upon which the same shall stand.”

The mechanics' lien statute has been held to be remedial and should be liberally construed. *Owen v. Chicago, B. & Q. R. Co.*, 86 Neb. 851. Fine distinctions

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sometimes arise as to whether material is furnished in the construction of a building as a tool or machine as part of the equipment of the contractor, or is used and consumed so as to entitle the furnisher to a lien on the building for its value. The question to be determined is whether the materials are to be regarded as practically consumed in the process of the work or whether they are to be regarded as becoming part of the equipment of the contractor; a distinction being made between tools and machinery and instrumentalities constituting part of the equipment and other supplies which, although used by the contractor merely for the purpose of facilitating his work, are consumed or mutilated so as to be of little or no value for future undertakings. See note 36 L. R. A. n. s. 866.

The complaint of the appellant that certain items allowed as freight, war tax, demurrage and handling charges, is without merit, as it is shown that those items were merely a part of the cost price of materials which went into the building. It is immaterial what items of cost are considered, provided the prices charged for the article delivered were the fair and reasonable market value of the materials involved. *Barker & Stewart Lumber Co. v. Marathon Paper Mills Co.* 146 Wis. 12.

A claim for cement sacks not returned was a proper charge, as no showing was made that the sacks had been charged for in the first instance. *Snell v. Payne*, 115 Cal. 218.

Three ladder items are objected to, but there is no showing that they did not constitute a part of the building.

By the agreement between Wunderling and the owner, Wunderling was to employ men and secure liability insurance to protect the risk. Premiums on liability insurance in pursuance of this contract were proper items of lien.

A quantity of coal amounting to \$99.80 was furnished in heating and drying the building. It was shown that

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this was necessary in the construction of the building and was one of the items entering into its erection and was therefore allowable. *Johnson v. Starrett*, 127 Minn. 138.

On the other hand, the following items in the account of J. C. Nitz, to wit, shovel handles, pair gloves, tape, rope, one dozen files, legal cap, box matches, pulley with hook, hammer, brush, sand-screen, lamp chimney, one saw file, in a total amount of \$17.40, should be disallowed. The plaintiff below also admits that an item of \$1.35 for corn furnished should be disallowed.

The decree of the district court is therefore modified by striking out the allowance of the following items: Crowell Lumber & Grain Company, corn furnished, \$1.35; Wright Electrical Construction Company, fixtures furnished, \$4.21 and J. C. Nitz, \$17.40. As thus modified the decree is affirmed.

AFFIRMED AS MODIFIED.

JENNIE NOVAK, APPELLEE, v. GEORGE REESON, APPELLANT.

FILED APRIL 21, 1923. No. 22332.

1. **Gifts:** GIFT OF NOTES IRREVOCABLE. Where a father, in making a loan of \$4,000 to one of his sons, required said son to execute four notes in the sum of \$1,000 each, payable to each of his four daughters, which said notes the father delivered to another son, with directions to hold said notes, collect the interest thereon and pay same to father during his lifetime, and at his death to deliver the notes to each of the daughters named therein, *held* a complete and irrevocable gift of the notes to the daughters.
2. ———: ———. Where a gift of notes is complete and irrevocable, the mere fact that the donor thereafter, without the knowledge or consent of the donee or holder, secured the notes from the possession of the holder and destroyed them, would not reinvest the title in the donor.
3. **Witnesses:** PRIVILEGED COMMUNICATIONS. Where an attorney is employed to draw a note which was subsequently destroyed, but is in no way consulted as to the legal effect of the instrument, he is not prevented by section 8835, Comp. St. 1922, from disclosing the terms and conditions of the destroyed note, or the statements made to him by his employer.

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APPEAL from the district court for Cuming county:
ANSON A. WELCH, JUDGE. *Affirmed.*

A. R. Oleson, for appellant.

P. M. Moodie, *contra*.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and
GOOD, JJ., BEGLEY, District Judge.

BEGLEY, District Judge.

Action brought by Jennie Novak against her brother, George Reeson, to collect the interest on a promissory note for \$1,000 executed by her brother under the following circumstances:

In April, 1918, Samuel Reeson, an aged man, had \$5,000 to his credit in the bank. He, having already provided for his sons, was desirous of giving \$1,000 of this to each of his four daughters, namely, Jennie Novak, Martha Pospishel, Mary Baker, and Charlotte Hietzman, and to retain \$1,000 for himself. However, his son George Reeson, desired to borrow \$4,000 from his father for a period of three years. The father only desired to loan the money for one year. Finally he called to him his sons Walter and Charles and explained to them the situation and stated that he consented to let his son George have the \$4,000 for three years; that in turn George was to sign four notes for \$1,000 each in favor of each of his four daughters above named; that said notes were to be held by Walter, the interest collected and paid to the father during his lifetime, and at his death the notes were to be turned over to the daughters named therein. Thereafter, in accordance with this plan, Samuel Reeson went to D. W. Merrow, an attorney in Omaha, Nebraska, and had him draw up four notes in the sum of \$1,000 each, payable to each of his four daughters, due in three years, with interest at the rate of 5 per cent. per annum, payable annually, and, together with a check for \$4,000 payable to George Reeson, transmitted the same to his son Walter, with directions to turn over to George

Reeson the \$4,000 check upon his signing each of the four notes, and for Walter to hold the notes in accordance with previous directions. This was accordingly done, and the notes were duly signed by George and placed in the possession of Walter Reeson, who placed them in his box in the bank, which was entirely under his control and to which he had the only key, and they remained in such possession over three months. Later the father, Samuel Reeson, came to live with his son Walter and had some receipts and other papers in Walter's bank box, and, when requested to do so, Walter went with him to the box and opened it so that his father could look over his other papers. Then came a time in July, 1918, when the father wanted to look at some papers in the box. Walter was too busy to go with him, so he took the box home, gave his father the keys, and, without the knowledge or consent of Walter, the father took therefrom the four notes and burned them in the kitchen stove, stating to one daughter that he did so to save trouble after his death. Thereafter Walter discovered the loss of the notes, and the father stated he had destroyed them and admitted he had done wrong.

The father died September 23, 1918. George paid the interest due on the notes to Walter up until the time of the father's death. After her father's death Jennie Novak brought this action to recover the interest due upon the note made in her favor, and the trial court, at the close of the evidence, directed a verdict in favor of the plaintiff for the full amount of the interest claimed. From this verdict and judgment thereon defendant has appealed.

The main question argued by the appellant is that the evidence is insufficient to show the delivery of this note to the appellee, in that there was not a completed gift of the note and the same was canceled and destroyed by the donor during his lifetime while it was within his control, and, therefore, any previously intended gift thereof was revoked and annulled.

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It may be conceded without argument that in all gifts a delivery of the thing given is essential to their validity and, if there be no delivery, the gift must fail. In order to effectuate delivery in this case the father must have delivered the note to his son Walter for the benefit of appellee, the payee therein eventually, and have expressed his intention to that effect, and also, at the time of such delivery to his son, the father must have parted with both the possession of the note and all dominion and control over it. The undisputed evidence shows the father caused these notes to be made out with the names of his daughters as payees, with the express purpose to give them the proceeds, except such interest as might accrue in his lifetime. In order to carry out this purpose he caused them to be delivered to his son Walter, who was to pay him the interest while he lived and at his death to turn the notes over to the several payees. Walter held them in his own exclusive possession in his bank box, to which he alone held the key. By this act the father made his son Walter the holder of the notes for the express purpose stated by him. He put the notes beyond his control, into the hands of his son, with express directions to carry out the trust. He did everything that could be done to carry out his plan of caring for himself during his lifetime with the income, assisting his son George with a loan, and also doing his duty by his daughters who had a claim on his bounty. This was a completed and irrevocable gift. In *Dinslage v. Stratman*, 105 Neb. 274, the question of delivery of a gift *inter vivos* is thoroughly discussed, various authorities cited and applied, and it was held that, where the proof is clear of an intention to make an absolute gift *inter vivos* of a chose in action arising from a debt not in writing, an unqualified direction by the donor to the debtor to pay the debt to the donee instead of to the creditor was a sufficient delivery of the gift, and the fact that actual enjoyment of the gift is to be deferred

until the donor's death does not render the gift either conditional, testamentary, or invalid.

The gift being completed and irrevocable, the mere fact that the donor thereafter, without the knowledge or consent of the trustee or the donee, secured the notes from the trustee's box and destroyed them did not re-invest the title in the donor. In *Brooks v. Brooks*, 105 Neb. 235, the father, who was the donor, obtained possession of an unrecorded deed, which had been delivered to his son and had been placed in a writing desk in the bedroom of the father, and burned it, saying that he wanted to make different arrangements. It was held that the title had passed by the deed. In *Svanda v. Svanda*, 86 Neb. 203, it was held that destruction by the grantor of a deed conveying real estate, after delivery and without the consent of the grantee, did not divest the grantee of the title. In *Brown v. Hartman*, 57 Neb. 341, it was held the destruction of a deed after its delivery did not divest the title of the grantee, even though the deed was surrendered by the grantee to the grantor.

The evidence affirmatively shows that before her father's death the appellee was informed by her father that Walter held the four notes and that after his death they became the property of the daughters. The daughter Charlotte also testified to a conversation wherein her father told her about the notes, referred to the destruction of them, and said that "George was as honest a boy as he ever had, and he said he would pay them without the notes—he would give them to us girls." The plan of withholding enjoyment of the money from the daughters during the lifetime of the father was planned to benefit the appellant, who desired the use of this money for three years. He was present at most of the conversations concerning the arrangement between the other sons and the father. He owes the money and agreed in the note to pay it to the appellee and this agreement is enforceable. *Tweeddale v. Tweeddale*, 116 Wis. 517.

Objection is made to the testimony of D. W. Merrow,

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attorney who drew the notes, because communications had with him by Samuel Reeson are claimed to be privileged. Mr. Merrow testified as to the form and contents of the destroyed notes and as to the directions and statements made by Samuel Reeson at the time. He was not consulted as to the legal effect of the delivery of the notes and his evidence was not privileged. *Turner v. Warren*, 160 Pa. St. 336.

The trial court was right in directing a verdict, and the judgment is therefore

AFFIRMED.

MORRISSEY, C. J., dissenting.

From an examination of the record, I reach the conclusion that the father never intended to make, and did not make, such delivery of the notes as to divest him of their control and ownership.

PAUL F. BOCKELMAN, APPELLEE, v. F. K. SPIRES,
APPELLANT.

FILED APRIL 21, 1923. No. 22344.

1. **Sales:** SALES AT AUCTION. If in an auction sale certain terms and conditions are announced publicly at the opening of the sale, a purchaser at such sale is bound thereby, whether he was present or not when they were made.
2. **Vendor and purchaser:** SETTLEMENT: ELECTION. Where a real estate contract provides for alternative methods of settlement, with the right of election in the first instance in the purchaser, and he refuses to exercise his right, the right of election then shifts to the seller.
3. **Specific Performance:** DECREE. A court of equity may properly enter a decree for specific performance providing that, on vendee's default in payment of the price, the premises be sold and judgment entered against him for the deficiency.

APPEAL from the district court for Merrick county:
FREDERICK W. BUTTON, JUDGE. *Affirmed.*

John C. Martin, for appellant.

Harold M. Morse and Reeder & Lightner, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and DEAN, JJ., BEGLEY, District Judge.

BEGLEY, District Judge.

Plaintiff brought a suit for specific performance of a certain contract for real estate. From a decree granting specific performance defendant has appealed.

On August 26, 1920, plaintiff, appellee herein, being the owner in fee of the real estate called Morningside addition to Clarks, Nebraska, offered all the lots therein for sale at public auction under certain terms and conditions which were printed and distributed before the sale and publicly announced at the opening of the sale. The lots were sold to the highest bidder, who immediately after the same were sold to him signed a memorandum evidencing the sale and purchase. The defendant purchased four lots for a total sum of \$2,290, and thereafter refused to settle for the same. He defended on two grounds: First, that plaintiff agreed to give an abstract of title with each lot purchased and failed to carry out said agreement; second, that plaintiff agreed not to sell the lots in the addition below a certain figure. He also contends that false representations were made by plaintiff which induced him to sign the memorandum.

Appellant was not present at the opening of the sale, and the evidence is undisputed that at the opening of the sale the auctioneer announced that an abstract of title brought down to the time of the platting of the addition, together with the opinion of an attorney thereon, was deposited in a local bank and could be inspected by any of the purchasers, but that no abstract of title would be furnished with each lot purchased. Appellant is bound by the announcement and printed terms, whether he was present or not when they were made at the opening of the sale, or whether or not he read the printed announcement. 6 C. J. 828, sec. 20.

The evidence as to whether the auctioneer, after commencement of sale, made announcement as to furnishing

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abstracts and as to whether he agreed not to sell lots under a certain price is conflicting, and the findings of the court thereon will not be disturbed. Moreover, appellee offered to furnish abstract, but appellant refused to pay purchase price.

There is some dispute as to what was said at the time the appellant signed the memorandum, but the defendant, when he appeared for settlement at the bank, gave as his only reason that he had paid too much for the lots and attempted to secure a reduction of the price. His defense of misrepresentation inducing him to sign the memorandum appears to be an afterthought.

Complaint is made of the form of the decree. The court decreed specific performance; held the entire purchase price due and payable; ordered the premises sold on foreclosure, and, if they failed to bring the purchase price, ordered a deficiency judgment against the appellant.

The memorandum provided that the purchase price should be paid "in cash or a note approved, as announced by the auctioneer." The auctioneer announced that the purchaser had the option of paying cash, less 5 per cent. discount on two-thirds of purchase price, or of paying the purchase price in three instalments, one-third cash and two deferred payments at six and twelve months each, with 8 per cent. interest. The appellant having refused to settle with the seller upon any terms at all, and the contract in question providing for alternative methods of settlement, with the right of election in the first instance in the promissor, the rule is well settled that, if the person who is given the first right of election fails or refuses for a considerable length of time to exercise his right, it then shifts to the other party. 36 Cyc. 575; 6 R. C. L. 860, sec. 247; *Noah v. Pierce*, 85 Mich. 70.

Where a contract for the sale of real estate is mutual, that is, if the vendee could maintain specific performance, then the vendor can do likewise, a deficiency judgment

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and a decree in favor of vendor for specific performance, providing that, on the vendee's default in payment of the price, the premises be sold and judgment entered against him for the deficiency, is proper. *Loveridge v. Shurtz*, 111 Mich. 618.

The decree of the district court is therefore right and is

AFFIRMED.

SECURITY STATE BANK OF ARNOLD, APPELLEE, V. CHARLES
W. BROWN, APPELLANT.

FILED APRIL 21, 1923. No. 22348.

1. **Bills and Notes: BONA FIDE PURCHASER.** Where a note, at the time of its purchase, is not stamped as required by the revenue laws of the United States, such failure to stamp does not destroy its negotiability, but is a circumstance to be considered in connection with all the other evidence in the case in determining whether or not the indorsee is in fact a holder in due course.
2. **Depositions: IRRELEVANT MATTER.** Where a deposition was taken and filed, covering several matters not in controversy in the suit, and plaintiff offered all of the deposition covering the subject-matter of the suit, *held* not error for the court to refuse to require plaintiff to read other incompetent or irrelevant facts and statements therein contained.
3. **Principal and Agent: AUTHORITY OF AGENT.** Where an agent of the payee of a note had written authority to indorse the note, which said authority was exhibited to the indorsee before the purchase, and the evidence establishes that the agent had such authority and had previously negotiated notes in the same manner, and where the proceeds of the note were placed by the bank to the payee's credit and paid out on order of the payee of the note, *held* sufficient to establish the authority of the agent to indorse the note to the plaintiff bank.
4. **Bills and Notes: BONA FIDE PURCHASER.** The issuing of a negotiable certificate of deposit, especially where it has been negotiated to a holder in due course and subsequently paid, is parting with value.
5. ———: **GOOD FAITH: QUESTION FOR JURY.** Where plaintiff, an indorsee of a note, called as witnesses the officers who conducted the negotiation for the purchase of the note, who testified to their good faith in the purchase of the note, the question as to whether

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that was sufficient proof of good faith on behalf of plaintiff was a question of fact for the jury.

6. **Instructions** examined and approved.

APPEAL from the district court for Logan county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Hoagland & Carr, Stewart, Perry & Stewart and W. T. Thompson, for appellant.

Cosgrave, Campbell & Ankeny, A. Moore Berry and Walter D. James, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

BEGLEY, District Judge.

Action to recover on a promissory note executed by defendant and purchased by plaintiff before maturity. The note was given to Sarvis Lumber Company in payment for certain shares of stock and by its agent, Perry Anthony, indorsed to plaintiff. Defendant admitted execution of the note, but alleged fraud in its inception. Plaintiff claimed to be a holder in due course. Trial was had to a jury in the district court for Logan county, Nebraska, and a verdict was returned for plaintiff, from a judgment on which the defendant has appealed.

It is first contended that the note was nonnegotiable because at the time it was purchased it was unstamped as required by the revenue laws of the United States, but such omission is only a circumstance to be considered with all the other evidence in the case in determining whether or not plaintiff was in fact a holder in due course.

The next error claimed is that the court erred in not requiring the plaintiff to read all of a deposition and in permitting it to offer only part thereof. It appears from the record that a deposition was taken covering several matters which were not in controversy in this suit. The plaintiff offered all of the deposition covering the subject-matter of this suit and defendant insisted on the whole

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deposition being read. The court ruled that, all that part of the deposition which related to the subject under consideration having been read, the reading of the remainder should not be required. In 18 C. J. 737, sec. 347, it is held: "A party introducing or reading a deposition in evidence may omit incompetent or irrelevant facts and statements therein contained, and answers that are not responsive, by direction of the court, or upon the court's deciding such facts or statements to be incompetent." Defendant made no offer to either have the evidence stricken out or to introduce the remainder of the deposition. We find no error in the court's ruling.

It is next contended that the agent of the payee had no authority to indorse the note to the plaintiff bank. The evidence shows that the agent had written authority to indorse the note, which was exhibited to plaintiff before the purchase. The president of the Sarvis Lumber Company testified that the agent had such authority and had previously negotiated notes in the same manner. Moreover, the proceeds of the note were placed by the bank to the credit of Sarvis Lumber Company and by them transferred and assigned to others, who drew them out. This evidence is sufficient to show the authority of the agent to indorse the note. Comp. St. 1922, sec. 4630; *Commercial Nat. Bank v. Brill*, 37 Neb. 626.

Defendant contends that the bank was not a holder in due course because it advanced no value for the note prior to notice of infirmities therein. When the note was taken by the plaintiff on April 16, 1919, it issued a negotiable certificate of deposit to Sarvis Lumber Company payable in one year. The certificate of deposit was negotiated to Bills & Cline, who presented it to plaintiff on May 3, 1919, and it was canceled and a new certificate of deposit issued in lieu thereof to Union Fire Insurance Company, which was paid when due. No evidence of fraud, collusion or bad faith is shown on the part of plaintiff in reissuing the certificate of deposit. The evidence is in dispute as to whether the plaintiff received

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notice of any infirmity in the note prior to the time the same became due. The issuing of a negotiable certificate of deposit, especially where it has been negotiated to a holder in due course and subsequently paid, is parting with value. Brannan, Negotiable Instruments Law (3d ed.) sec. 52; *Elmore County Bank v. Avant*, 189 Ala. 418.

It is contended that the evidence is insufficient to support the findings of the jury because plaintiff failed to show that all the officers of the bank who took part in the negotiation for the purchase of the note acted in good faith and without notice of any defense or infirmity in the note. Defendant contends that C. W. Robinson, the assistant cashier, had some part in the transaction regarding the purchase of the note. He was a witness for plaintiff and his only evidence was that he affixed the stamps after the purchase. Failure of proof as to being a holder for value, like any other question of evidence, sometimes resolves itself into a question of law and at other times into a question of fact. In *Riverton State Bank v. Walker*, 107 Neb. 672, we held there was a failure of proof as a matter of law, where the defendant's evidence affirmatively showed bad faith on the part of the cashier who conducted negotiations for the purchase of the note, and who failed to deny the defendant's statements on the witness-stand; but in this case the plaintiff called as witnesses the persons who transacted the business which resulted in the negotiation of this note and there was testimony as to their good faith and no notice of any defenses to the note. Whether that was sufficient proof of good faith to satisfy the jury was a question of fact for the jury. *McLaughlin-Gormley-King Co. v. Hauser*, 195 Ia. 224.

Certain instructions of the trial court are criticized, but an examination of the instructions as a whole shows that the case was fairly submitted to the jury upon the theory advanced by defendant. By instruction No. 8 the jury were told that, if the defendant established the

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defense of fraud in the inception of the note as alleged, the verdict should be for the defendant, unless plaintiff satisfied them by a preponderance of the evidence that it acquired said note as a *bona fide* holder in due course.

We find no error in the record, and the judgment of the district court is therefore

AFFIRMED.

EDWARD E. GUSTIN & COMPANY, APPELLEE, v. NEBRASKA
BUILDING & INVESTMENT COMPANY ET AL., APPELLANTS:

F. B. BAYLOR, TRUSTEE, INTERVENER.

FILED APRIL 21, 1923. No. 22268.

1. **Damages:** CONTRACT: CONSTRUCTION: LIQUIDATED DAMAGES. Whether the sum mentioned as damages in a building contract and indemnity bond is a penalty or liquidated damages may be a question of construction. In determining this question, the subject-matter of the contract, the consideration, the intention of the parties, all the evidence, facts and surrounding circumstances, and the language and context of the contract, must be carefully considered. And where the damages are uncertain, and not readily capable of exact ascertainment by any known rule, and the parties surveyed the whole situation at the time of contract, and agreed upon the amount of damages, in case of a breach in the contract to construct a building by a certain time, such sum, in case of a breach, is the true measure of recovery and is liquidated damages and not a penalty.
2. **Evidence** examined, and *held* that this action was not prematurely brought.

APPEAL from the district court for Lancaster county:
FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Johnson, Moorhead & Rine, Good & Good and A. W. Lane, for appellants.

Stewart, Perry & Stewart, for appellee.

Johnson, Moorhead & Rine and F. B. Baylor, for Baylor, Trustee.

Heard before MORRISSEY, C. J., GOOD and ALDRICH, JJ.,
BEGLEY and BUTTON, District Judges.

BUTTON, District Judge.

On the 20th day of February, 1919, Edward E. Gustin & Company, appellee, entered into a 99-year lease with the Nebraska Building & Investment Company, one of the appellants, to a parcel of ground, belonging to appellee, and situated between the Lincoln Hotel and the Lincoln Drug Company on P street, Lincoln, Nebraska, one of the business sections of the city. There were buildings situated on these premises at the time, of the value of \$15,000; but they were in a bad state of repair, and to render them fit for rental purposes required an outlay of considerable money. By the terms of the lease these buildings were to be razed to the ground and removed. And, also, by the terms of the lease, appellant was to erect a new fire-proof edifice, at least four stories high, and complete the same by January 1, 1921. The covenant to erect this new building was the inducement that caused appellee to enter into the lease. Appellant agreed to pay \$250 a month during the life of the lease as rental, and to pay taxes, keep up repairs, ordinary and extraordinary, and to pay all assessments, and keep up insurance, etc. The lease further provided that, if appellant failed to erect the building as agreed, appellee's actual damages should be \$15,000. To procure the faithful performance of this lease an indemnity bond in the sum of \$15,000 was given, with the Nebraska Building & Investment Company as principal and certain other of the appellants as sureties.

Appellant began the actual erection of a building, excavating, building footings and concrete walls and other foundation work, and then defaulted and ceased work entirely. After January 1, 1921, the Nebraska Building & Investment Company went into the hands of a receiver. One William E. Barkley was appointed receiver, and later the leasehold interest in the premises was sold to one Eugene C. Eppley, who is now in possession. In all other respects there has been no default in

the terms of the lease, and the taxes and rentals are paid.

After January 1, 1921, this action was instituted on the bond, to recover the \$15,000 damages. A trial by the court without a jury resulted in a judgment for appellee for the full amount. To reverse this judgment appellants have prosecuted an appeal to this court.

Appellants argue that the excavation and foundation work that has been done on the property has added value to the property far in excess of \$15,000, and hence appellee is the gainer and the damages provided for in the bond should be treated as a penalty and recovery denied. This argument overlooks the rights of appellee under the contract. The inducement that caused appellee to enter into the contract was the building of the new structure. Possibly appellee did not have the money to put up the building itself. If not, of what value will this hole in the ground and foundation work be to appellee? If the old buildings had been repaired, appellee might have realized a better rental; without the building being erected appellee is not sure of his rent.

A modern building should last practically forever. If so, this would be a very valuable property at the end of the lease with such a building standing upon it. Then, too, is such a contract to be treated so lightly? Is it something to be brushed aside as a sort of a dream? If appellee could have erected the building itself, its rentals, no doubt, would have been large from such a structure. But it contracted to forego these large rentals and accept \$250 a month and apply the balance for 99 years to pay for the new edifice. If we figure from this standpoint, appellee will pay a pretty big price for its building in 99 years. Everything considered, it seems to us that in this larger view, looking to the future, almost a century, rather than to the present, appellee is the loser rather than the gainer. And his rent has been rendered insecure, problematical, and very uncertain. The consideration for this contract is ample.

The intention of the parties to this contract was to make certain the payment of the rent through the years to come, and to this end the inducement was the construction of this building. In determining the amount of the bond, it seems quite natural that the value of the old buildings removed should be adopted. Rentals to the amount of the value of the old buildings, at least, should be protected.

We now come to the question of damages. The evidence shows a six-story building of fire-proof construction would cost about \$581,000. The evidence shows a four-story building of like construction would cost one-fourth less. At least such a building, then, would cost more than \$400,000. It was the duty of appellants to keep the building in repair, so that on the termination of the lease the building should be worth at least what it cost. Under such circumstances the measure of damages is the cost of construction. 24 Cyc. 1109; 1 Tiffany, Landlord and Tenant, sec. 117; 2 Underhill, Landlord and Tenant, sec. 542; *Barnhart v. Boyce*, 102 Ill. App. 172. And some courts adopt the measure as the present worth of the cost of construction; that is, such a sum as will, at the legal rate of interest, produce the fair cost of the building at the end of the term. *Wentworth v. Manhattan*, 218 Mass. 91.

It is reasonably certain the actual damages will far exceed \$15,000. Indeed, the damages from the failure to pay rent are liable to far exceed \$15,000. This is one of these situations where the damages are uncertain, problematical, and not readily ascertainable by any known rule. These facts were all considered by the parties, and a careful survey of the situation made. After due deliberation and careful thought, the parties themselves agreed that the damages should be \$15,000. *Gillilan v. Rollins*, 41 Neb. 540; *Lee v. Carroll Normal School Co.*, 1 Neb. (Unof.) 681. In the light of the foregoing authorities we are of the opinion the true measure of damages in this case is the \$15,000 named in the lease

and bond and that the same are liquidated damages and not a penalty. 17 C. J. 960, sec. 259; *Crawford v. Heatwole*, 110 Va. 358, 34 L. R. A. n. s. 587.

It is also argued that this action was prematurely brought. The lease reads that a four-story building of fire-proof construction shall be completed by January 1, 1921; and the bond reads that the principal and sureties will pay \$15,000 as liquidated damages on or before January 10, 1921, if a breach occurs in the covenant to build. Section 9 of the lease reads as follows:

"The lessee agrees that within one year after receiving possession it will begin erection of a building of fire-proof construction covering the entire ground of a basement and grade (or first) story and as many stories above the first story as lessee may choose to build, and such stories may be in such form as lessee shall desire. Lessee will add other stories whenever it desires so to do, but at least four (4) stories by January 1, 1921."

The last part of the bond reads as follows:

"Now, therefore, the Nebraska Building & Investment Co., as principal, and Frank E. Schaaf, J. H. Gore, E. O. Gregg, H. L. Lohmeyer, R. W. Johnston and Joseph Sukovaty, Jr., as surety, do separately and collectively for themselves, their heirs, administrators, successors and assigns firmly bind themselves to the payment to lessor on or before January tenth, nineteen twenty-one, of the sum of fifteen thousand (\$15,000.00) dollars as liquidated damages should lessee fail in its covenants as set forth in section nine (9) of said lease."

There is little room for construction here. The intent seems plain. Since the life of the lease runs beyond the life of this generation, some time had to be fixed for the completion of the structure. If the life of the lease had been for some short period of time, say five or ten years, it might not have been necessary to fix a time, for parties might reasonably expect to outlive their lease and enforce it at the end thereof, if necessary. But in a

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lease to run for nearly a century it was necessary to fix a time for completing the building, for parties have a right to know whether contracts are being fulfilled, so they may enforce them while living, if they are not.

It appearing that some time was necessary to be fixed for completing the building, a reasonable time became a proper subject of contract. Two years was certainly a reasonable time.

The breach occurred January 1, 1921. The statute of limitations began running against an action on the bond at that time. There was no assurance that Eppley intended to build. The lower court was unable to tell what Eppley's intentions were, and we are not from the record before us. Everything considered, we are of the opinion the action was timely and not prematurely brought.

The judgment of the lower court is right, and is

AFFIRMED.

LILLIAN E. BAKER, APPELLEE, V. OMAHA & COUNCIL
BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED APRIL 21, 1923. No. 22328.

1. **Street Railways: USE OF STREETS.** The right to use street intersections in cities by street cars and pedestrians is mutual, relative, and reciprocal.
2. **Negligence: CONTRIBUTORY NEGLIGENCE: DAMAGES.** "If, on the trial of an action 'brought to recover damages for injuries to a person or to his property caused by the negligence of another,' plaintiff is found to be guilty of negligence directly contributing to the injury complained of, he cannot recover, even though defendant was negligent, unless the contributory negligence of plaintiff was slight and the negligence of defendant was gross in comparison therewith; and if, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any degree that which, under the circumstances, amounts to slight negligence, or if the negligence of defendant falls in any degree short of gross negligence under the circumstances, the contributory negligence of plaintiff, however slight, will defeat a recovery. And even when plaintiff has established his right to recover under this rule, it is the duty of the jury to deduct from the amount of damage sus-

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tained such amount as his contributory negligence, if any, bears to the whole amount of damage sustained. Rev. St. 1913, sec. 7892." *Morrison v. Scotts Bluff County*, 104 Neb. 254.

3. **Trial:** INSTRUCTIONS. The charge of the court examined, and held to be free from reversible error, and to fairly include matters contained in instructions tendered by appellant and refused by the court.
4. **Damages.** Held, that under all the evidence, facts, and circumstances, the verdict in this case is not excessive.

APPEAL from the district court for Douglas county:
CHARLES A. GOSS, JUDGE. *Affirmed.*

John L. Webster, for appellant.

Crofoot, Fraser, Connolly & Stryker, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN and DAY,
JJ., BUTTON, District Judge.

BUTTON, District Judge.

Lillian E. Baker was, at about 7:45 o'clock a. m., on October 4th, 1920, a passenger on one of appellant's street cars and was traveling north on Twenty-fourth street, Omaha, Nebraska. She alighted from the front end of this car at the intersection of Twenty-fourth and Evans streets where the car stopped to discharge its passengers. She passed to the south to the rear end of this car and then proceeded to cross the tracks near the rear end of the car from which she had alighted. She was a student of the University of Omaha, located near this intersection, and was on her way to school. The track upon which this car had arrived, and upon which it was standing while discharging its passengers, was paralleled by another track upon which cars traveling in the opposite direction passed. These tracks were a little more than four feet apart, but the space between the sides of the cars, as they passed each other, was only about ten inches. As Miss Baker passed around the rear of the car, and was crossing the tracks, she says she listened for an approaching car, but heard no signal. She also says she looked for an approaching car as she passed the side of the standing car, and claims she then saw the approaching car and heard

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the gong, but at that very instant was struck by the front end and side of the passing car, which, it is claimed, was running at a rapid and unlawful rate of speed. Another passenger, just ahead of Miss Baker, had stepped upon the passing track and was struck, but Miss Baker was struck just at the instant she was about to step upon the passing track, but before she had done so.

There is a sharp conflict in the testimony as to the rate of speed at which this passing car was running at the time of the collision. And there is also a sharp conflict as to whether Miss Baker looked and listened before attempting to make the crossing. Appellee's witnesses place the rate of speed at the time of the impact at from 18 to 25 miles an hour, much in excess of 15 miles an hour, the maximum allowed by the ordinance of the city. The testimony of appellant brings the rate of speed well within the maximum allowed by the ordinance and at all times reasonable and proper. The appellant also offered some testimony as to the distance in which a car, moving at 25 miles an hour, could be stopped, in an effort to show 25 miles an hour impossible.

The situation created at this crossing was a very dangerous one. The duty of the appellant and appellee was a mutual one. Each should have used a reasonable degree of care to avoid an accident. If the car was operated at a high rate of speed as it passed the standing car discharging its passengers, under the circumstances it was gross negligence on the part of appellant. If appellee failed to look and listen for an approaching car before trying to make the crossing, she was guilty of contributory negligence that was more than slight, and she cannot recover, even though appellant's negligence was gross. After a careful examination of the evidence, we cannot say, as a matter of law, that the negligence of appellant was less than gross, nor that the negligence of appellee was more than slight, in comparison. Under the comparative negligence statute of this state, the court must find one of these two things to exist before it

is justified in taking a case from the jury, or that there was more than slight contributory negligence, as a matter of law. We believe the rate of speed of this car at the time of the impact, whether or not appellee looked and listened before attempting to make the crossing at a time when by listening she might have heard the signal from the car, and by looking she might have seen the car in time to have prevented the accident, and whether or not the speed of the car was so great that it could not be stopped in time to have prevented the collision, were all questions of fact to be submitted to the jury under proper instructions.

Many of the cases cited by appellant are from courts where the statute of comparative negligence does not exist. In some of those jurisdictions slight contributory negligence prevents a recovery. To apply this rule in this jurisdiction would be to render nugatory our statute. And some of the cases cited are out of harmony with the rule prevailing in this state and, as we believe, against the weight of authority.

The right to use street intersections in cities by street cars and pedestrians is mutual, relative, and reciprocal. And if both appellant and appellee were guilty of negligence in the exercise of such use, unless the court can say as a matter of law, from all the evidence, facts, and circumstances, the negligence of the appellant was less than gross, or that the negligence of the appellee was more than slight, in comparison, or that the negligence of appellee was more than slight, as a matter of law, regardless of whether appellant was guilty of negligence or not, the questions involved were matters of fact calling for the services of the jury under proper instructions by the court, if there were sufficient evidence to support a verdict for the plaintiff. *Morrison v. Scotts Bluff County*, 104 Neb. 254; *Stewart v. Omaha & C. B. Street R. Co.*, 88 Neb. 209; *Bremer v. St. Paul City R. Co.*, 107 Minn. 326, 21 L. R. A. n. s. 887; *Burton v. Lincoln Traction Co.*, 106 Neb. 521.

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Appellant excepts to the last part of instruction No. 9 which reads as follows:

"It is the duty of a pedestrian to look before he crosses the track, and, if there is an obstruction which interferes with his view he should use additional care."

Appellant claims the clause, "he should use additional care," is vague and uncertain. Yet appellant's request No. 6, contains practically the same language. When instruction No. 9 is read in connection with the whole charge we believe the clause complained of is not misleading.

Appellant's complaint with reference to instruction No. 10 is based upon his construction of the evidence. Of course, if appellee were guilty of more than slight negligence, whether appellant was guilty of negligence or not becomes immaterial, it was the duty of the court to have directed a verdict for appellant. We do not so construe the evidence. As said before, we are unable to say, as a matter of law, that appellant's negligence was more than slight; hence, the question was one for the jury under the comparative negligence statute. This instruction simply called attention to this statute, and the court gave a proper instruction explaining the application of this statute.

The matters set forth in instructions Nos. 4 and 6 are fully covered by the court in its own instructions and these instructions were properly refused.

The evidence with reference to appellee's injuries seems ample to sustain the verdict. The medical experts differ to some extent. However, Dr. Kennedy was very conservative and knew all the facts, and his testimony alone is sufficient to sustain a verdict if believed by the jury; and it evidently was. We are of the opinion, under all the evidence, that the verdict is not excessive.

Finding no reversible error in the record, the judgment is

AFFIRMED.

Kerwin v. Thompson, Belden & Co.

EDITH KERWIN, ADMINISTRATRIX, APPELLANT, V. THOMPSON, BELDEN & COMPANY ET AL., APPELLEES.

FILED APRIL 21, 1923. No. 22275.

1. **Municipal Corporations: BUILDING ORDINANCE NOT RETROACTIVE.** A city ordinance which requires all elevator shafts in all fire-proof buildings erected after the passage of the ordinance to be inclosed in fire-proof partitions is not retroactive so as to apply to buildings erected before the passage of the ordinance.
2. **Negligence: MAINTENANCE OF ELEVATOR SHAFT.** The maintenance of an elevator shaft built before the passage of the ordinance without being so inclosed is not such a violation of a legal duty as to give rise to an implication of negligence, because of the ordinance.
3. ———: **EXPOSURE TO KNOWN DANGER.** A person who knowingly and of his own volition exposes himself to an obvious danger cannot recover damages for any injury which he might have avoided by the use of reasonable care.
4. ———: **PRESUMPTION.** Where there was no witness to an accident causing death, the presumption is, in the absence of evidence to the contrary, that decedent exercised due care; but this presumption is rebutted when the circumstances proved show that decedent was negligent.
5. ———: **CONTRIBUTORY NEGLIGENCE.** Evidence examined, and held insufficient to show that defendants were guilty of negligence, and, further, that the death of decedent was caused by his own negligence.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

Crofoot, Fraser, Connolly & Stryker, for appellant.

Switzler, Ringer, Switzler & Shackelford and *Gurley, Fitch & West*, contra.

Heard before MORRISSEY, C. J., LETTON, ALDRICH and DEAN, JJ., RAPER, District Judge.

RAPER, District Judge.

Action by plaintiff as administratrix to recover damages for negligence in causing the death of her husband, Albert Kerwin. At the close of plaintiff's testimony the court excused the jury and dismissed the case.

The proof established that about 1905 defendant Hoagland erected a building and leased same to defend-

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ant Thompson, Belden & Company. An elevator was installed in the building soon after its erection. The shaft of the elevator was protected by a wire mesh or grating up to about seven feet from the floor, and from the top of this mesh to the ceiling, about six or seven feet, the shaft was unguarded. Several years before the date in question, Thompson, Belden & Company procured the American District Telegraph Company to install and keep in repair a night watch and fire and burglar alarm. This alarm system also included several other large business buildings. The wires for this alarm system in the Hoagland building were run up the elevator shaft, and on the second floor the wires left the elevator shaft at the top of the wire mesh and ran around the walls to a clock, where watchmen were required to periodically register, and thus give notice of their presence to the A. D. T. Company central office. A short time before the day of the accident Thompson, Belden & Company in making some alterations on the second floor of the building by way of new shelving, had caused the wires running to the clock to be disengaged from their usual place and some new shelving to be built against the wall. This shelving was constructed up to the elevator shaft; the top was about two or three feet wide and six feet above the floor. The wires that had been loosened were laid on top of this new shelving, and there is some evidence that might indicate that the wires in the elevator shaft had at one time been fastened to the wall of the elevator shaft but had become loosened. The owner of the building had no knowledge of the installation of the alarm system. The A. D. T. Company located and installed the wires without the location being designated by Thompson, Belden & Company; the A. D. T. Company placing the wires and apparatus where it deemed advisable. The deceased had been employed about three years by the A. D. T. Company as a "trouble shooter." In case of trouble on a line the chief operator would send out a "trouble shooter," whose duty it was to test

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the lines and locate the break or source of the trouble. A "trouble shooter" in his efforts to locate a break or trouble would go to any place on the line where he might desire, and the process of testing was to cut one of the three insulated wires that formed the connecting circuit and open it up at the end, then, when test was made, twist the ends together again and put tape around it. That was what they called a test station. It was not the custom of these linemen to notify the people in any of the buildings when the "trouble shooter" went to make a test. On two occasions somewhere around spring or fall prior to the day in question the deceased went with another lineman and made tests of the system in the Thompson, Belden & Company Store, these tests, as a matter of convenience, were made near the elevator shaft.

In 1914, after the erection of the building, and the elevator shaft, the official building code of the city of Omaha was enacted by the city council. This code required all fire-proof buildings "hereafter erected" to have elevator shafts inclosed in fire-proof partitions, extending from the street level to the top of the building, and by another section provided that no wires, except such as necessary to operate or light the elevator, should be placed in the shaft of any elevator; declared such wires a nuisance, and required their removal on 30 days notice by the building inspector.

About 10:30 o'clock on the morning of January 3, 1920, deceased went to the second floor of the Thompson, Belden & Company store to test the circuit, and a descending elevator cage struck him on the top of the head producing almost instant death. No one saw the accident, and the manner of his death must be deduced from the circumstances. At that time the place was well lighted. The elevator was running in the usual manner, and by looking at the wire cables it could be plainly seen whether the elevator cage was below or above the place. The deceased did not tell any one in the building of his presence or purpose, and no

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notice was given Thompson, Belden & Company, or the person operating the elevator, or any of their employees, of the presence or purpose of deceased. There was a counter about three feet high a short distance in front of the newly-placed shelving above referred to. Deceased probably got on this counter, and from there climbed to the top of the shelving against the wall, unwrapped and cut one of the wires about six or eight inches from the point where the wires left the elevator cage, evidently to make a test of the circuit. The elevator cage was descending in the usual manner, when it came to a stop, rattled and felt as though it was wedged. Then the man's head was seen wedged between the side of the elevator carriage and the grating, the body extending along the top of the wall case or shelving. There was a space of about six inches between the grating and the side of the elevator. The testimony indicates that deceased probably would be kneeling while making test of the wires.

Appellant alleges that there is sufficient evidence to require the submission of the case to the jury, and that the court erred in refusing to do so. The negligence alleged is the failure of the defendants to inclose the elevator shaft from the floor to the ceiling; and permitting the wires of the A. D. T. Company signal system to be placed in the elevator shaft; that the wires were taken down from their former location and the new shelving placed so as to require the lineman to work near the open elevator shaft; that defendants knew, or should have known, that A. D. T. would work at the place of the accident, and that each and all of these alleged acts of negligence required the submission of the case to the jury. The petition sets out the alleged acts of negligence in great detail, but the foregoing appears sufficient to cover all that is necessary. The district court found that "the unfortunate death of the deceased was brought about by his own act of negligence in allowing a portion of his body to be in this elevator shaft

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where he must have known that the elevator was running up and down, and there is no legal liability on either defendant in this case."

Strong emphasis is placed by appellant on the alleged violation of the Omaha ordinance, the building code, which, it is claimed, constitutes negligence *per se*, and the principle announced in *Stevens v. Luther*, 105 Neb. 184, is invoked, that the failure to perform a mandatory and affirmative duty imposed upon owners of property by statutes and ordinances is negligence *per se*, and if any person to whom the duty is owed, or for whose protection the law was enacted, is injured in consequence of such violation, a case is made. Taking up, first, the provision of the ordinance which forbids the placing of wires in an elevator shaft. Under the terms of the ordinance such wires are directed to be removed on notice. There is no proof of notice to either defendant to remove them, and for that reason appellees insist that no negligence can be imputed to them. But, aside from the question of the legal duty, if any, resting on the defendants, or either of them, by virtue of the ordinance, there does not seem to be any relation between the position of the wire in the elevator shaft and the injury to deceased. However glaring an infraction of the ordinance may have been committed or permitted by the defendants, unless the placing of the wires contributed to cause the death, the defendants, of course, are not answerable for it. Nowhere does it appear in the evidence, either by direct testimony or by any reasonable inference from the proved facts, that deceased was injured because the wires ran up the elevator shaft. The mere fact that the test station by deceased's own choice was made near the elevator shaft does not tend to prove that the location of the wires in the elevator shaft had any direct relation to the accident. Deceased was not required to work near the elevator shaft. He chose the place of work. As a convenience to himself he selected the place near the elevator. Neither of the defendants

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nor their employees knew of his presence, or that he intended to work, or where he might choose as a place to test the wires. No circumstances were developed which indicate that the wires in the elevator shaft required his attention. His choosing a place to work near the elevator is far from proving that the fact of the wires being in the elevator contributed in any way to the injury.

The building was erected by defendant Hoagland and occupied by Thompson, Belden & Company before the ordinance was enacted. The ordinance does not include buildings already erected, where it provides for the manner of inclosing elevator shafts; the wording being: "In all fire-proof buildings hereafter erected, all elevators, whether passenger, freight or dumb-waiter elevators, shall be inclosed in fire-proof partitions," etc. It is probable that the main purpose of these provisions was to guard against the spread of fires, but whether it was for that purpose or to prevent persons from being injured, or both, we need not stop to consider. The ordinance by its plain terms does not apply to the building in question, so it lacks the requisite legislative "mandatory and affirmative" or compulsory obligation to place it within the rule announced in *Stevens v. Luther*, *supra*. Furthermore, it may be said of the elevator shaft, as has been said of the wires, that nothing appears in the evidence that indicates any necessity for the deceased to work in the elevator shaft, or even near it. The shelf on top of the wall case was two or three feet wide, giving safe and ample room for deceased to work. He knew, or must have known, that the elevator was being continuously operated, and could definitely tell whether the cage was above or below him, and to place his head in the shaft below a descending elevator would be extremely hazardous. It follows that the maintaining of the elevator shaft was not the proximate cause of accident.

Appellant urges the rule that the presumption is, in

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the absence of eye-witnesses, that at the time the deceased was killed he was in the exercise of ordinary care. This presumption, however, is rebutted whenever the evidence shows the situation to have been such that deceased, if he had looked, would have realized the danger and avoided it. The evidence is clear that deceased was no more than a licensee of the lessee of the building; that he went on the premises to perform a duty for his master; that he did not inform any of the defendants or their employees of his presence or intended work; that he voluntarily chose the place of his work near the elevator shaft; that the place where he did choose to work was reasonably safe; that no part of his duties required him to place his body in the elevator shaft; that, even if he found it necessary to look into the shaft, the danger attending such act was so obvious as to conclusively overcome the legal presumption of due care on his part.

The trial judge rightfully held that the deplorable accident was due wholly to the negligence and fault of the deceased, and the judgment of dismissal must be

AFFIRMED.

LOUIS A. KROPP, APPELLEE, V. MISSOURI PACIFIC RAILWAY
COMPANY, APPELLANT.

FILED MAY 15, 1923. No. 22338.

Railroads: INJUNCTION: WEIGHT OF EVIDENCE. When, in a suit in equity between the owner of a farm and a railroad corporation, the question at issue is the adequacy of a subway which the corporation purposed to build under its line of track to serve as a passageway for the live stock kept upon the farm, the witnesses for the farmer have not seen such a subway in actual use. but, basing their testimony upon their experience as farmers and stockmen and their general knowledge of live stock, testify that the subway will prove inadequate, while the witnesses for the railroad corporation testify that they have used similar subways or have seen them in use, and that they proved entirely adequate, the testimony of the witnesses who base their testimony upon actual use, or observation, will be held to have the greater weight.

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APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Reversed and dismissed.*

E. J. White, J. A. C. Kennedy and Yale C. Holland, for appellant.

D. W. Livingston, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN and DAY, JJ., BUTTON, District Judge.

MORRISSEY, C. J.

Plaintiff is the owner of a farm of 160 acres in Otoe county, Nebraska, which is crossed by defendant's line of railroad. The farm buildings and feed lots, occupying approximately 20 acres, are situated upon the west side of defendant's track, while the remainder of the farm is situated on the east side of the track. Plaintiff and his grantors have owned and occupied the farm for upwards of 50 years. Defendant's track was constructed in 1887 and has been continuously operated since its construction. At a point on plaintiff's farm where it is crossed by the railroad there is a valley or depression in the surface of the earth. At this point defendant erected a trestle, or bridge, which was 12 to 15 feet in length and about 8 feet in height. When first erected this trestle served to support the track for defendant's trains, while leaving a passageway underneath the track which was used by the occupant of the farm as a runway for his live stock, and a road for his teams. As the years went on the construction of the trestle was somewhat changed by the addition of piling and the filling in of the embankment until the opening became too small for the passage of teams and wagons, but it has always remained adequate for the passage of hogs, cattle and horses from the feed lots to the pasture, and *vice versa*. In addition to this subway passage there has been, and is, maintained a grade crossing such as is in general use in this state where a farm is intersected by a line of railroad. Prior to the filing of this suit defendant made plans for the substitution of concrete boxes or subways for the wooden

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trestles along its lines of track, and in the particular instance with which we are dealing it arranged to remove the wooden trestle and erect in its place a concrete box, or subway, 4 feet wide, 6 feet high, and 43 feet in length. Plaintiff brought this action to restrain defendant from making the substitution planned, claiming, so far as is necessary to mention here, that the concrete box would not furnish an adequate passageway for plaintiff's live stock. The issues were tried to the court, and from a judgment in favor of plaintiff defendant has appealed. A number of issues were presented on the trial below and argued in the brief on appeal which we shall not mention in this opinion, because it is conceded that, if the concrete box which defendant purposes to install be found adequate as a passageway for plaintiff's live stock, such finding will necessarily control the judgment of the court and a discussion of the other issues would be futile.

Plaintiff, an experienced farmer and live-stock breeder, testified that he had never seen such a subway as defendant purposed to install, and, therefore, could not say from actual experience as to its sufficiency. He stated that the only purpose for which he desired the subway was for a passageway for live stock; and that it had not been used in recent years for the passage of teams and vehicles. He described the horses upon his farm as being of the large type used for farm purpose, weighing between 1,400 and 1,600 pounds, between 5 and 6 feet tall at the withers, and about 7 feet to the top of the horses' heads when held in their natural positions. He conceded that the proposed subway would be ample for the passage of hogs, and that cattle could pass through. However, he expressed the belief that it would, to some extent, become filled with snow and ice in the winter; that this would reduce the size of the opening, make the floor of the subway slippery, with the consequent danger of animals falling, and that in such case the opening would prove too narrow to permit proper

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handling of the animals. Plaintiff called as witnesses several farmers and stockmen who concurred in what plaintiff had said and pointed out the difficulty in case two animals should undertake to enter the opening at the same time. These witnesses say that it would be impossible for the two animals to travel side by side through the subway. They testified also that live stock traveling in opposite directions might meet in the subway and because of its limited width it would be impossible for any of them to turn around and one animal or group of animals would be compelled to back out of the subway. Furthermore, that in case of such occurrence, if any animal should be unable to protect itself against the stronger animals, it might be trampled under foot and injured. These witnesses with one accord expressed the opinion that the proposed subway would be too narrow for the use of cattle, and both too narrow and too low for the use of horses. On the other hand, defendant offered the testimony of its district engineer who stated that the type of subway which defendant intended to install was the standard type and size in general use on the tracks of the defendant corporation; that such subways had been installed under his personal supervision and were in use in Kansas, Missouri, Arkansas, Oklahoma, and Louisiana; that a thorough test of their adequacy as passageway for stock had been made; that he had personal knowledge of the subject, and that cattle and horses readily adapted themselves to the use of such subways; that the openings do not fill up with ice or snow; and that the bottoms are built of concrete and do not become wet or muddy. Another of defendant's engineers testified that he had observed such subways on numerous occasions when in actual use; that the largest horses passed through them readily; and that he had taken pictures of cattle and horses passing through subways such as defendant purposed to install. These pictures are in evidence and they are of a persuasive nature. Hereford cattle appear to be passing

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freely through. A horse said to weigh 1,600 pounds is likewise seen emerging from the subway, and apparently he had ample room. We are not unmindful of the pranks that a camera may play, but the pictures presented by the camera seem to have abundant support in the oral testimony, not only of the officers and employees of defendant, but in the testimony of farmers whose lands are traversed by defendant's line of railroad and where subways of the size and type under consideration are in actual use. The testimony of these witnesses is based upon actual experience and they say such subway is adequate for plaintiff's needs.

All witnesses apparently are men of character. The witnesses for plaintiff testified as to the inadequacy of the proposed subway, in their judgment, but their testimony is not based upon actual experience or personal observation, while the witnesses for defendant based their testimony upon personal observation and actual use.

From a consideration of all the evidence, we reach the conclusion the evidence preponderates in defendant's favor, and that the subway proposed to be installed is adequate to serve the purposes for which it is intended. The judgment of the district court is set aside and plaintiff's action dismissed.

REVERSED AND DISMISSED.

EMMET CROUCH, APPELLEE, V. MISSOURI PACIFIC RAILWAY
COMPANY, APPELLANT.

FILED MAY 15, 1923. No. 22339.

APPEAL from the district court for Otoe county:
JAMES T. BEGLEY, JUDGE. *Reversed and dismissed.*

E. J. White, J. A. C. Kennedy and Yale C. Holland,
for appellant.

D. W. Livingston, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN and DAY,
JJ., BUTTON, District Judge.

Buzzello v. Sramek.

MORRISSEY, C. J.

This appeal presents substantially the same issues as those presented in the case of *Kropp v. Missouri P. R., Co.*, ante, p. 257. The cases were tried together in the court below and presented together in this court. They are so closely related that the finding in one case necessarily becomes the finding in the other. This being true, the judgment of the district court is set aside and plaintiff's petition dismissed.

REVERSED AND DISMISSED.

CAMILLO BUZZELLO, ADMINISTRATOR, APPELLANT, v.
THEODORE SRAMEK, APPELLEE.

FILED MAY 15, 1923. No. 22378.

1. **Negligence:** RES IPSA LOQUITUR. Where, in an action for damages against the owner of an automobile who parked the car against the curb of a public street having a 10 per cent. grade, stopped the engine and securely set the brakes, which were in good condition, the car is shown to have remained at the place where parked from 10 to 20 minutes, and, then, propelled by gravity, to have run down the street and produced the injury complained of, and third persons are shown to have been in proximity to the car while it was parked, in the absence of evidence tending to show that the car was started through some agency for which defendant was responsible, the rule of *res ipsa loquitur* will not be applied.
2. **Appeal:** RULINGS ON INSTRUCTIONS. The defeated party cannot successfully complain of the rulings of the court on the giving or refusing to give instructions where the court would have been justified in directing the jury to return a verdict in favor of the other party.
3. **New Trial:** NEWLY DISCOVERED EVIDENCE. "In order to obtain a new trial on the ground of newly discovered evidence, the evidence alleged to have been newly discovered must be such that the party applying for the new trial could not with reasonable diligence have discovered and produced it at the trial." *Van Horn v. Cooper & Cole Bros.*, 88 Neb. 687.

APPEAL from the district court for Douglas county:
JAMES M. FITZGERALD, JUDGE. *Affirmed.*

John O. Yeiser and E. A. Conaway, for appellant.

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Kennedy, Holland, DeLacy & McLaughlin, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

MORRISSEY, C. J.

This action was brought by plaintiff as administrator of the estate of Raffaele Buzzello, a child two years of age, who was fatally injured May 24, 1920, by an automobile belonging to defendant which defendant had left standing upon one of the streets of the city of Omaha. The street descended at a 10 per cent. grade to the west, and it is alleged that defendant left his car on the south side of the street facing west with the engine running, without having the brakes securely set or the wheels "at the proper degree against the curb;" that the vibrations of the engine caused the car to break the hold of the brakes, and through the force of gravity descend the street, cross the curb thereof, and produce the injury complained of.

In his answer defendant made a general denial of negligence, and alleged that he had parked the car against the curb and securely set the brakes, which were in good condition, shut off the engine and left the car in such a position that it could not be moved without the interference of some outside agency, and that the movement of the car was the result of some person, unknown to defendant, having tampered with the car and released the brakes. The cause was tried to a jury, and from a verdict and judgment for defendant, plaintiff has appealed.

Plaintiff offered the testimony of a neighbor who witnessed the accident. He testified that he had seen the car parked at the curb in front of defendant's home; that it was parked "in a diagonal shape." He saw the car run down the hill and strike the child. He went to the car immediately after the accident, but could not say whether the engine was running or not. Having been recalled for redirect examination, and being again cross-

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examined as to the position of the car when parked; in answer to the question, "The front wheels were up against the curb?" he answered, "It looked that way; yes, sir." Two other witnesses who saw the car strike the child were called by plaintiff. But they had not seen the car at the curb, knew nothing of the way in which it had been parked or of the agency which put it in motion.

Defendant testified that he parked the car at an angle of about 45 degrees to the curb, with the emergency brake securely set, and that he stopped the engine. In this he is corroborated by the testimony of his sister-in-law, who was a passenger with him at the time he parked the car, and by the testimony of a pedestrian who passed on the north side of the street after the car had been parked and who subsequently saw the car running down the hill, and witnessed the accident. A neighbor who lived across the street described the parking of the car in substantially the same way. From the testimony of all the witnesses we may say that it is conclusively shown that from 10 to 20 minutes elapsed between the parking of the car and the time of the accident. The physical facts were such that, if the car was parked with one wheel against the curb and the brakes, which are shown to have been in good condition, securely set, the car could not have left the curb and run down the hill without the intervention of some agency for which defendant was not responsible. There is testimony to show that between the time of parking the car and its descent of the hill two or three boys were playing in the street close to the car. They are not shown to have meddled with the car, and we are left to conjecture as to whether they turned the steering wheel and released the brakes. However, there is a total failure of proof of any negligence on the part of defendant, unless we do as requested by plaintiff, namely, apply the rule of *res ipsa loquitur*. Under the record presented this we cannot do.

The fact that the automobile remained in the position

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in which it was parked from 10 to 20 minutes before it descended the hill is corroborative of defendant's testimony; it indicates that the car was properly parked, and the circumstances surrounding the accident are more consistent with the view that it was caused by some unknown person releasing the brakes and turning the steering wheel than by the defendant's negligence.

As announced in *Keber v. Central Brewing Co.* 150 N. Y. Supp. 986: "The rule of *res ipsa loquitur* cannot apply, where no negligence of defendant is shown by direct evidence, and it is apparent that there may have been other causes than defendant's negligence which led to the accident."

Appellant complains of the instructions of the court; but, inasmuch as plaintiff has wholly failed to make out a case against defendant and the court would have been justified in directing the jury to return a verdict in defendant's favor, it is unnecessary to review the instructions.

In support of the motion for a new trial plaintiff filed affidavits showing the discovery of two witnesses by whom it is alleged he could furnish new or additional evidence. According to the showing only one of these could contribute anything material to the issue. At the time of the accident this witness was a tenant of plaintiff and for several months thereafter she continued to reside on the same lot with plaintiff and his family. The intercourse between the families appears to have been cordial, and sufficient reason is not shown for the failure to produce this witness at the trial.

"In order to obtain a new trial on the ground of newly discovered evidence, the evidence alleged to have been newly discovered must be such that the party applying for the new trial could not with reasonable diligence have discovered and produced it at the trial." *Van Horn v. Cooper & Cole Bros.*, 88 Neb. 687.

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There is no prejudicial error in the record, and the judgment is

AFFIRMED.

HENRY WILSON, APPELLANT AND CROSS-APPELLEE, V. CITY OF NELIGH, CROSS-APPELLEE: CHARLES H. FRIDLEY ET AL., INTERVENERS, APPELLEES AND CROSS-APPELLANTS.

FILED MAY 15, 1923. No. 22255.

1. **Vendor and Purchaser: CONTINGENT SALE.** Where the holder of the legal title to a small tract of real estate has sold to another the right of possession until the happening of a contingency, the fact that the duration of the term depends upon a condition which may, or may not, take effect, does not operate to defeat the sale.
2. **Quieting Title: DISCLAIMER: DECREE.** Where, in an action against a city to quiet title to a strip of land formerly claimed by the city as a street, the city disclaims all title or interest in the property, the decree should quiet the title in the owners as against the city, without imposing any limitation or qualification in its favor.

APPEAL from the district court for Antelope county:
ANSON A. WELCH, JUDGE. *Affirmed as modified.*

J. F. Boyd, for appellant.

A. R. Oleson, contra.

Heard before **MORRISSEY, C. J., LETTON, DAY and DEAN, JJ.,** **BUTTON, District Judge.**

LETON, J.

This is an action against the city of Neligh to quiet the title in plaintiff to a strip of land 80 feet wide along the north side of blocks 126 and 139 in the city of Neligh, and south of a tract of land owned by the interveners, Charles H. and Rose Fridley. It seems that the city of Neligh in April, 1914, recovered a judgment in the district court adjudging said real estate to be a street of the city. The judgment was appealed to the supreme court by certain of the defendants, but not by the plaintiff in this case, who was a defendant in that case. Afterwards plaintiff sold to Charles H. and Rose Fridley, by a written contract, about 24 acres immediately north of

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this strip. These parties intervened in this cause, seeking to quiet the title and possession of this strip in them. This written contract, after providing for sale of the 24-acre tract, contained the following provision:

"Inasmuch as a certain tract of real estate (describing the strip in dispute here) has been determined by judgment of the district court of Antelope county, Nebraska, entered on the 18th day of April, 1914, to be a street of the city of Neligh, Nebraska, of which 80-foot strip the parties of the first part (plaintiff in this case and his wife) are in possession, and which it is within the range of possibilities might remain their property and not be opened as a street, it is therefore agreed that the parties of the first part shall turn over to the parties of the second part, on the 1st day of September, 1915, the possession of said 80-foot strip, which they may retain until possession is required of them by the city of Neligh, the consideration of the above tract being the consideration for the use and possession of said real estate."

Immediately following this provision, as the contract was originally typewritten, there was a clause to the effect that Fridley should pay for this strip in case the supreme court held that there was no street there. While negotiations were pending, Fridley objected to this, saying that if this provision was in the contract he would have to pay for this strip twice. This clause was then stricken out by ink lines drawn across it before the contract was signed. Plaintiff admits signing the contract, but says he misunderstood this provision, but he does not allege any fraud in the transaction. Fridley asserts that, under the quoted provisions of the contract, he is entitled to the title and possession of the 80-foot strip, and asks to have the title quieted in him. The trial court quieted the title in plaintiff as against the city. It also found that, by the terms of the contract, the strip of land in controversy was treated by the parties thereto as a street of the city, to be opened at the option of the

city, and, as between the plaintiff and Fridley, the contract constituted a continuing offer of dedication of the land as a street, which may be accepted by the city at any time, by the passage of an ordinance therefor, before the same has been canceled by the consent and agreement of both the plaintiff and the Fridleys; that by the terms of the contract the interveners are entitled to possession of the premises until possession is desired by the city for use as a street; that the city is estopped from claiming any title or interest in the premises against the interveners other than the right to open it as a street prior to the revocation of such offer by the parties making the same; that plaintiff holds the naked, legal title to the premises, subject to the right of possession by the interveners until the same shall be required of them by the city of Neligh for a street. Plaintiff appealed, and interveners filed a cross-appeal.

The city of Neligh by the pleadings disclaimed any interest or right to the strip in controversy, and makes no complaint of the decree. The question as to the respective rights of the interveners and the plaintiff in the disputed strip depends upon the terms of the written contract, and more especially upon that portion of the same above quoted.

What are the respective rights of the plaintiff and of the interveners? No appeal having been taken by plaintiff, the judgment of the district court in the former action deciding that the city was entitled to the strip as a street was final as to him. Plaintiff, however, was entitled to the possession of the strip until the city desired to open it for public use. He was rightfully in possession when he entered into the contract with interveners. This possessory right he could sell and convey, and this he did by the quoted provision of the contract. By their purchase interveners are entitled to hold possession until the condition that the city requires the possession of the strip for a street arises. But the city having disclaimed, in this proceeding, title or interest in

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the property whatever interest it had by virtue of the judgment reverts to plaintiff, the owner of the legal title, subject, however, to the right of possession in the interveners. Interveners bought and paid for this possessory right, but they did not buy the title in fee. They are entitled to a decree finding their right of possession, but are not entitled to a decree granting the legal title in them, as they ask. The city is not entitled to a judgment, or finding, in its favor in any respect. It asked for nothing, and expressly disclaimed any interest in the property. The court properly quieted the legal title in plaintiff, subject to the possessory right sold to interveners by the contract. Further than this the decree does not seem to be warranted. The decree of the district court is therefore modified so as to quiet the legal title in the property involved in plaintiff, subject, however, to the right of possession in interveners, as granted by the quoted provisions of the contract.

The parties are left in a somewhat anomalous situation as to their rights in the strip, and, yet, it is not infrequent that one person may have the legal title to real estate subject to a right of possession in another. The right to sell or buy remains open if it is desired to unite the two estates.

As above modified, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

HENRY H. MOLLER, APPELLEE, V. JAMES MALLORY ET AL.,
APPELLANTS.

FILED MAY 15, 1923. No. 22381.

1. **Principal and Agent:** FRAUD OF AGENT: RETENTION OF BENEFITS. A principal who retains benefits derived from the fraudulent conduct of his agent after notice of the fraud is chargeable with the instrumentalities employed by the latter in carrying out the fraudulent purpose.
2. **Fraud:** EXCHANGE OF LANDS: MEASURE OF DAMAGES. Where the owner of land, through an agent, under circumstances such as shown

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in this case, has pointed out, to one desirous of exchanging other lands for the same, land which he did not own as the land which he owned and proposed to convey, and afterwards conveyed land of much less value than that which was pointed out, and which he, the grantee, supposed he was to acquire, the party defrauded may recover the difference in value between the land shown him and the land which was actually conveyed to him.

3. **Estoppel:** EXCHANGE OF LANDS: FRAUD. The statement in a contract for the exchange of land, "We each have inspected each other's property and are dealing solely on our own judgment," etc., will not estop one of the parties, to whom other and better land than that described in the contract had been fraudulently shown by the agent of the grantor in order to induce him to enter into the same, from showing the fraud in an action for damages for deceit.
4. **Fraud:** EXCESSIVE DAMAGES. Evidence as to value of land examined, and held that the amount of recovery is excessive.

APPEAL from the district court for Douglas county:
CHARLES A. GOSS, JUDGE. *Affirmed on condition.*

A. R. Davis and Baldrige & Saxton, for appellants.

McKenzie, Cox, Burton & Harris, contra.

Heard before MORRISSEY, C. J., LETTON, DAY and DEAN,
JJ., BUTTON, District Judge.

LETTON, J.

This is an action to recover damages on account of an alleged fraud perpetrated by the defendants upon the plaintiff in a transaction concerning the exchange of certain real estate. There is a direct conflict in almost every essential and material question of fact in the evidence, but, the jury having accepted plaintiff's theory of the case, the facts will be stated accordingly.

Plaintiff was a farmer residing at Burwell, Nebraska. He was more or less a buyer and seller of real estate, mostly carrying out his transactions through the aid of a real estate man in Omaha named Patzman. He had become vested with the title to 320 acres of land in Cedar county, Nebraska, which he had never seen. On his way to examine the land, he stopped at Wakefield, Nebraska, and was accosted by defendant Mallory, a real estate

dealer of that place. He informed Mallory that he desired to dispose of the Cedar county land. After some conversation he gave Mallory the address of Patzman in Omaha, and told him if he found any property which might be exchanged for the Cedar county land to communicate with Patzman. Mallory did this, and informed Patzman that defendant Stageman, who lived at Randolph, owned 520 acres of land in South Dakota, which he might be willing to exchange for the Cedar county land. Patzman then made arrangements with Mallory to meet plaintiff in Sioux City, and to go with him to look at the land. When they arrived at Nowlin, a small town near where the land was situated, Mallory procured a man by the name of Jacobson to drive them out to the land. After driving several miles, Mallory said to plaintiff, "This is your land," showing a slightly rolling and apparently fertile tract in section 35. After their return to Nebraska, Mallory and Patzman, in Omaha, drew up duplicate forms of contracts which were taken by Mallory to Randolph for submission to Stageman. After some negotiations between Stageman and Patzman over long distance telephone, certain changes were made in each contract. They were thereafter signed by each of the parties. Deeds of conveyance were afterwards made in accordance therewith. Some time afterwards, when plaintiff came to examine the the land in sections 28 and 29, which was described in his deed, he found that it was not the same land which had been shown to him. The land was rough and of poor quality, a creek ran through it, with a number of ravines or draws running into the creek, with banks from 10 to 20 feet high. Very little of it is cultivable, and that only in small patches, and the land is worth a great deal less than the land in section 35 which had been shown to him. He then began this action for damages on account of fraud and deceit.

The evidence in the case is voluminous. One of the chief points in controversy is whether Mallory was the

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agent of Moller or the agent of Stageman. Stageman made a special appearance in the action, objecting to the jurisdiction of the court for the reason that the action was brought and Mallory summoned in Douglas county; that he was served with summons in Cedar county; that there is not a joint cause of action against both defendants; that the allegations in the petition charging joint liability are a mere artifice and device to bring Stageman into the jurisdiction of the court in Douglas county. This special appearance was overruled. The same objections were preserved by the answer.

We are convinced from an examination of the testimony that there is evidence to warrant the finding that Mallory was Stageman's agent, that Mallory was guilty of active participation in the fraud, and that Stageman, having received and retained the fruits of the fraudulent actions and representations of Mallory after the same were brought to his knowledge, is a joint wrongdoer with him. A summons therefore might properly issue from Douglas county to be served upon him in Cedar county in the case.

The contract contains the following printed clause: "We each have inspected each other's property and are dealing solely on our own judgment, and not upon any representations that had been made to us, and have carefully read this contract before signature." It is insisted by defendants that plaintiff is estopped by reason of this recital from asserting that he has been defrauded. But the land that was shown to him, and as to which he spoke in this statement, was other land than that which was described in the contract, and, as the jury found, he was deceived and misled when he signed the paper containing this recital. Under such circumstances an estoppel cannot arise.

It is asserted that the court erred in instructing the jury with respect to the measure of damages. They were instructed that if they found for the "plaintiff he would be entitled to receive the difference between the reason-

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able market value of the 360 acres of Jackson county, South Dakota land that was pointed out to the plaintiff, and the reasonable market value of the 360 acres of Jackson county land which the plaintiff actually received in the said exchange on the 4th day of June, 1918." While some states have adopted a different measure of damages in such cases, the rule stated by the trial court is that which is accepted here. *Odell v. Story*, 81 Neb. 437; *Dresher v. Becker*, 88 Neb. 619. See cases collected in note in 8 L. R. A. n. s. 806.

Exceptions were taken to the rulings of the court as to the admission or exclusion of certain evidence. Considering all the testimony introduced at different periods of the trial, we think defendant suffered no prejudice therefrom, except perhaps as to the testimony of plaintiff with respect to the values of the land in South Dakota.

It is contended that Stageman cannot be held to have ratified the act of Mallory if he in fact pointed out other and better land to plaintiff than that afterwards conveyed to him. The testimony shows that Stageman is no novice in the exchange and transfer of lands. He has made no offer of rescission since acquiring knowledge of the conduct of his agent, but has insisted on the contract being carried out. He retains the fruits of the transaction, and the fact that he willingly paid Mallory a commission of \$1,000 for consummating the exchange is worthy of note.

It is complained that the verdict is so excessive that it must be the result of passion and prejudice. We think there is some cause for this complaint. Excluding the testimony of plaintiff, who testified to the highest value placed upon the land by any witness, and for whose testimony an insufficient foundation was laid, four witnesses as to value testified on behalf of plaintiff. One of them valued the land in section 35, which was shown to plaintiff, as being worth \$35 an acre, while that in sections 28 and 29 he valued at \$3.50 an acre. Two

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other of plaintiff's witnesses testified the land shown was worth \$30 an acre, and the land conveyed \$3.75 to \$5 an acre; while another witness called by plaintiff testified that the land in section 35 was only worth \$10 an acre, and the rough land \$3.75 an acre. On the other hand, the witnesses for defendants, one of whom had been a register of deeds of the county, and also township assessor, testified that the land shown was worth about \$20 an acre, and the rough land about \$10. The highest estimate of the value of the land shown by other of defendants' witnesses was \$25 an acre, and the lowest from \$15 to \$20, and the estimate of the rough land varied from \$7.50 to \$15 an acre.

The jury found the difference in value between the two tracts to be \$25 an acre, or \$9,000 in all. Considering the testimony with respect to the value of the land, we are convinced that it does not sustain a verdict for \$9,000 as the difference in value. The jury having found in favor of plaintiff, he is entitled to recover his actual damages, but he is not entitled to a speculative, or excessive, award. Considering the mass of testimony and the cost of a new trial, we are reluctant to set aside the verdict *in toto*. The testimony as to value, all elements being considered, satisfies us that the verdict is excessive to the extent of \$4,500. If plaintiff, therefore, is willing to remit the sum of \$4,500 as of the date of judgment, the judgment, as thus reduced, will be affirmed, otherwise it will stand reversed.

The testimony in the case is peculiar, and would be unsatisfactory whether the jury found for plaintiff or for defendant. The zeal of plaintiff's attorney led him in some instances rather close to the border line during his examination of witnesses, but if there is a second trial he will probably be a little more circumspect in his suggestions and implications to the jury.

The judgment is reversed unless plaintiff file a remit-

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titur in the above sum within 20 days. In such case it will stand affirmed.

AFFIRMED ON CONDITION.

NATIONAL BANK OF COMMERCE, PLAINTIFF, v. HENRY J. LEFFERDINK ET AL., DEFENDANTS: FRED R. FITZPATRICK, RECEIVER, ET AL., APPELLEES: BERT BUNNELL, APPELLANT.

FILED MAY 15, 1923. No. 22394.

1. **Deeds: INTEREST CONVEYED: RENTALS.** "Rent reserved by lease of real estate, and not accrued at the time of a conveyance of the reversion, passes with such conveyance to the grantee. Every conveyance of real estate passes all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." *Eiseley v. Spooner*, 23 Neb. 470.
2. **Vendor and Purchaser: RENTALS.** A grain buyer who knowingly receives from a tenant the landlord's share of crop rent must at his peril pay the proceeds to the person entitled thereto, and where the former owner has transferred the title to the land, and the conveyance has been made a matter of public record, the crop being immature at that time, payment to the former owner will not discharge the purchaser of the grain from liability to account to the real owner for such proceeds.
3. **Estoppel: GRANTORS.** H. J. L., the owner in fee of a tract of real estate in this state, conveyed the same by warranty deed to a foreign corporation. In a proceeding to recover rent which they had received after such conveyance, F. E. L., claiming as assignee of H. J. L., and B., acting for him, assert that the title had never passed from H. J. L., for the reason that the grantee corporation was incompetent to take title to real estate in this state. *Held*, that H. J. L. would be estopped to question the competency of his grantee to take title for that reason, and that F. E. L., and B., being in privity with him, are likewise estopped.

APPEAL from the district court for Lancaster county:
WILLIAM M. MORNING, JUDGE. *Affirmed.*

Doyle, Halligan & Doyle, for appellant.

Hainer & Flansbury and *Hall, Cline & Williams*, contra.

Heard before MORRISSEY, C. J., LETTON, DAY and DEAN, JJ., BUTTON, District Judge.

LETTON, J.

The controversy in this appeal is not between the original parties to the suit, which was for the foreclosure of certain mortgages. It is concerned with the right to the rents accruing in the year 1919 upon the 480 acres of land affected by the decree. During the crop season of 1919 the land was occupied by tenants under leases providing for a share of the crops as rent, Henry J. Lefferdink, the owner of the fee title, being the lessor. This action was begun June 24, 1919. On March 25, 1919, Henry J. Lefferdink conveyed the land in pursuance to a contract made in February, 1919, to the Bankers Land, Cattle & Development Company, an Arizona corporation. This deed was filed for record in April, 1919. In July, 1919, the Arizona corporation conveyed the legal title to the land to the First Trust Company of Lincoln, Nebraska. The trust company executed an agreement to collect the rents from the land and apply the proceeds upon the incumbrances involved in this litigation. This deed was filed for record July 21, 1919. About August 1, 1919, one of the tenants delivered the landlord's share of his wheat crop to one Bert Bunnell, a grain dealer of Denton, who purchased the same, and on September 9, 1919, paid the proceeds to T. J. Doyle, as the agent or attorney of Frank E. Lefferdink, who claimed it under assignment, or power of attorney, for Henry J. Lefferdink.

A decree of foreclosure was rendered on November 18, 1919. The court found that the proceeds of sale of the property would probably be insufficient to pay the liens adjudged to exist, appointed George W. Holmes receiver, and directed him to control the land and rent the premises, also to collect the rents for 1919. Afterwards Frank E. Lefferdink filed a petition in the case, making all parties in interest parties to the proceeding, except Bunnell, and praying the court to determine the right to the rent for 1919. Answers were filed. In the answer of the receiver he alleged that he had the right to

the crops, and asked that Bunnell be made a party. The court ordered this to be done, but he was not served with summons in time to appear when the matter was set for hearing. Frank E. Lefferdink claimed the rent upon two grounds: First, an oral assignment made in November, 1918, when Henry J. Lefferdink, upon borrowing money from a bank of which Frank E. Lefferdink was then cashier, and in February, 1919, upon borrowing from Frank individually, told Frank to apply the rent from this land upon the debts; second, upon a power of attorney executed to him by the Arizona corporation authorizing him to collect the rents. On May 21, 1920, a hearing was had. The court found that Frank E. Lefferdink had no right, title or interest in the rents, and the receiver was directed to collect the rents for the year 1919 and apply the proceeds in accordance with the further orders of the court. It was also found that one of the tenants has paid to Bert Bunnell, of Denton, rents which should have been paid to the receiver. The receiver was directed to collect the remainder of the rents for the year 1919, including the sums paid to Bert Bunnell, and the matter was continued for hearing as to Bunnell. No appeal was taken from this decree. It is therefore final as to all parties then before the court.

Afterwards Bunnell answered, admitting the delivery of the rent wheat to him, alleging that Frank E. Lefferdink claimed to be the owner and demanded the proceeds, having a written assignment of the rents; that he had paid the rents for former years to Frank E. Lefferdink, and that in good faith, without notice, he had paid to him the \$513 realized from the wheat delivered to him by Dalton from the 1919 crop, and that this payment was made on September 9, 1919, before Holmes had been appointed receiver.

The reply of the receiver alleges that at the time Bunnell paid the money to Lefferdink he knew there was a controversy over the ownership of the wheat, and de-

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manded and received an indemnity bond before he paid it; denies that it was paid in good faith and without notice; alleges that the decree of May 21, 1920, is *res judicata* as to the right of Frank E. Lefferdink to the rents for 1919, and that Bunnell knew that the lienholders were claiming ownership of the rent. At the trial the evidence taken at the former hearing was received in evidence. Bunnell made the same defense that Frank E. Lefferdink had made at the former hearing. It was not shown that this crop was in existence at the time of the alleged oral assignment, and it was shown that the written power of attorney under which Frank claimed had never been authorized by, or executed by, the Arizona corporation, and was a mere nullity. The claim is now made that the deed from Henry J. Lefferdink to the Arizona corporation is void because a foreign corporation is incompetent to take title to real estate in Nebraska. Henry J. Lefferdink, the grantor to the corporation, is estopped to take this position. *Eiseley v. Spooner*, 23 Neb. 470. Both Frank E. Lefferdink and Bunnell, who stand in his shoes in this respect, are likewise estopped.

As to the defense based on lack of notice, the statute provides: "Every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." Comp. St. 1922, sec. 5591.

In *Eiseley v. Spooner*, 23 Neb. 470, the first paragraph of the syllabus is as follows: "Rent reserved by lease of real estate, and not accrued at the time of a conveyance of the reversion, passes with such conveyance to the grantee. Every conveyance of real estate passes all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." See, also, *Allen v. Hall*, 66 Neb. 84; *In re Estate of Andersen*, 83 Neb. 8; *In re Estate of Pope*, 83 Neb. 723; *Cooper v. Kennedy*, 86 Neb. 119. This is the general rule. 1 *Tiffany, Landlord and Tenant*, sec. 180.

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When Henry J. Lefferdink parted with the title in March, 1919, he conveyed all his interest in the growing crop, and no one could derive any right or title to it from him thereafter. The conveyance to the Arizona corporation and by it to the First Trust Company were upon record at the time Bunnell paid the money to Mr. Doyle for Frank E. Lefferdink. This was all the notice required by law in this state. In England a statute requires a purchaser to notify a tenant of a change of title in order to hold the tenant liable if he pay the rent to the former landlord, but there is no such statute in this state. Furthermore, that Bunnell had doubts as to the right of Frank E. Lefferdink to receive the rent is apparent from the fact that he would not pay the money to Frank E. Lefferdink's attorneys until he received a guaranty from him against loss by so doing. He explains this by saying that he had heard that there was a controversy between the brothers, and that he insisted on having the guaranty to protect himself in the event that Henry, and not Frank, was entitled to the money. The guaranty is not in the record. So far as we can tell from his statement of its terms, it may be broad enough to protect him. The money in his hands belonged to the holder of the title to the land, and he was bound at his peril to know that Frank E. Lefferdink was entitled to the money before he paid it to him. *Taylor, Cole & McLeod v. Pope*, 5 Cold. (Tenn.) 413; cases collected, 20 A. L. R. 132.

The judgment of the district court is

AFFIRMED.

W. L. HUFFMAN AUTOMOBILE COMPANY, APPELLANT, v.
MOLINE PLOW COMPANY ET AL., APPELLEES.

FILED MAY 15, 1923. No. 22397.

1. **Appeal:** MOTION FOR NEW TRIAL. The filing of a motion for a new trial is unnecessary to obtain a review in this court of a judgment dismissing a cause before any evidence is taken for the reason that

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the petition does not state facts sufficient to constitute a cause of action. *Horton v. State*, 60 Neb. 701.

2. ———: ———: TRANSCRIPT: TIME. In such a case, the filing of a motion for a new trial in the district court is improper, and is of no avail to extend the time within which a transcript of the judgment must be filed in this court in order to confer jurisdiction upon it to review the judgment of dismissal.
3. ———: ———: REVIEW. A judgment of dismissal for the reason that the petition does not state a cause of action was rendered in the district court on June 8, 1921. No evidence was adduced and no issue of fact submitted. A motion for a new trial was filed, and was overruled on July 5, 1921. The præcipe on file recites that this appeal is taken from a judgment rendered on the 5th day of July, 1921. A transcript was filed in this court less than three months from the overruling of the motion, but nearly four months from the judgment of dismissal. *Held*, that the filing of a motion for a new trial was not proper and was useless in such a case; that this court never acquired jurisdiction to review the judgment of dismissal; that it did acquire jurisdiction to review the order of the district court overruling the motion for a new trial, and that such motion was properly overruled.

APPEAL from the district court for Douglas county:

L. B. DAY, JUDGE. *Appeal dismissed.*

John O. Yeiser and John O. Yeiser, Jr., for appellant.

Nolan & Woodland and Stout, Rose, Wells & Martin, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and DEAN, JJ., BEGLEY, District Judge.

LETTON, J.

A judgment of dismissal was rendered in this case on June 8, 1921. A transcript and præcipe for appeal were filed in this court on October 3, 1921, nearly four months after the judgment. A motion for a new trial was filed in the district court on June 10 and overruled on July 5, 1921. The præcipe on appeal recites: "This appeal is from a judgment rendered in the district court of Douglas county, Nebraska, on the 5th day of July, 1921." There is no bill of exceptions. The record shows that a jury was impaneled, and the opening statements

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of counsel made. Defendants then objected to the introduction of evidence. The court sustained the objections, "for the reason that the petition of plaintiff does not state a cause of action." The jury was discharged, and the action dismissed. A motion for a new trial was filed June 10, alleging that the court erred in sustaining the motion of each defendant to direct a verdict, and that the court erred in dismissing the plaintiff's petition. Since no verdict was directed, the first two grounds fail, so that the sole error alleged is that the court erred in dismissing the plaintiff's petition.

Section 8825, Comp. St. 1922, defines "new trial" as follows: "A new trial is a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision by the court."

In *Horton v. State*, 60 Neb. 701, paragraphs 6 and 7 of the syllabus are as follows:

"6. A motion for a new trial is proper only where there has been a trial of an issue of fact on the pleadings.

"7. A final judgment based upon a pleading defective in substance may be reviewed without a motion for a new trial having been filed and ruled upon."

In that case a peremptory writ of mandamus was allowed by the district court against a corporation and its officers, without notice to the respondents, and in their absence. Counsel for the relators contended that the judgment was not subject to review because the errors committed were not brought to the notice of the district court by a motion for a new trial. The court say: "Upon this point it is, we think, sufficient to say that there was no trial or semblance of a trial. The petition, which, in the absence of an alternative writ, must be regarded as a pleading, was considered and held to state facts sufficient to entitle the relators to the relief demanded. The question decided was one of law and not of fact. A motion for a new trial is proper only where there has been a trial of an issue of fact on the pleadings."

In *Claflin v. American Nat. Bank*, 46 Neb. 884, it is

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said: "Rulings which do not pertain to the trial in such a sense as to make them assignable as causes for a new trial, such as rulings upon demurrers, *motions addressed to pleadings*, and motions to dismiss, need not be called to the attention of the trial court by motion for a new trial."

In *Bennett v. Otto*, 68 Neb. 652, where the question involved was to be decided by the record, the court say: "Here there was a mere examination of the record presented, and a motion for a new trial could have alleged nothing except that the court erred in deciding the matter incorrectly upon the record."

In *First Nat. Bank v. Sutton Mercantile Co.*, 77 Neb. 596, the third paragraph of the syllabus is: "Where a judgment at law is rendered on the pleadings alone, a motion for a new trial is not necessary to obtain a review in this court." In the same case it is said: "A new trial is a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision by the court (Code, sec. 314); and a motion for a new trial is a motion for such reexamination. The judgment was rendered without an examination of any of the issues of fact, consequently there could be no reexamination of any such issues, and it would be absurd to hold that the defendant was required to ask what the court could not possibly grant. *Bannard v. Duncan*, 65 Neb. 179. The judgment involved a mere construction of the pleadings, and in such a case no motion for a new trial is required in order to obtain a review in this court. *Scarborough v. Myrick*, 47 Neb. 794; *Hays v. Mercier*, 22 Neb. 656; *Clafflin v. American Nat. Bank*, 46 Neb. 884."

To the same effect are *Slobodiskiy v. Curtis*, 58 Neb. 211; *Walker v. Burtless*, 82 Neb. 214; *Anderson v. Union Stock Yards Co.*, 84 Neb. 305; *Fairbanks, Morse & Co. v. Austin*, 96 Neb. 139. The courts of California, Kansas, Indiana, and Oklahoma hold to the same effect. *Morange v. Morris*, 32 Barb. (N. Y.) 650; *Dodge City Water-Supply Co. v. City of Dodge City*, 55 Kan. 60. The pro-

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cedure in the latter case was identical with that of the case at bar, except that the motion for a new trial was stricken from the files at the succeeding term of the trial court upon the ground that the motion was improper and unauthorized. *Werley v. Huntington Water-Works Co.*, 138 Ind. 148; *Wagner v. Atchison, T. & S. F. R. Co.*, 73 Kan. 283; *Russell v. First Nat. Bank*, 65 Ia. 242; *Doorley v. Buford & George Mfg. Co.*, 5 Okla. 594.

In view of this long-settled rule, the motion for a new trial could not extend the time for taking an appeal from the judgment. There having been no trial of an issue of fact, but only a ruling upon the sufficiency of the petition, there could be no "new trial" as defined in the statute.

According to the præcipe, this appeal is only taken from the judgment, or order, of July 5, 1921, overruling the motion for a new trial. The transcript was filed in time to appeal from this order. The motion for a new trial might properly have been stricken from the files by the district court, but to overrule it could not be prejudicial. The transcript was not filed in this court for nearly a month after the time for taking an appeal from the judgment of dismissal, and this court therefore never acquired jurisdiction to review the same. The judgment of the district court overruling the motion for a new trial is affirmed. The appeal from the judgment of dismissal is dismissed for want of jurisdiction.

APPEAL DISMISSED.

SAMUEL NATHAN, APPELLEE, V. MARTIN JENSEN.
APPELLANT.

FILED MAY 15, 1923. No. 22418.

1. **Contracts: ALTERATIONS: PRESUMPTION.** In the absence of evidence as to the fact, the presumption is that alterations appearing on the face of a written contract were made before its execution.
2. ———: ———. If all the facts with respect to the making of an alteration in one of two duplicate written contracts are in evidence.

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the determination of how, when or with what motive the change is made is for the trier of fact.

APPEAL from the district court for Douglas county:
CARROLL O. STAUFFER, JUDGE. *Affirmed.*

Nolan & Woodland, for appellant.

Stout, Rose, Wells & Martin and James O'Hara, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and
DEAN, JJ., BEGLEY, District Judge.

LETTON, J.

Plaintiff seeks to reform a lease and to recover rent which is due under its terms, if reformed as plaintiff desires. Duplicate leases were drawn up whereby the plaintiff leased to the defendant a room in Omaha to be used for a saloon for the sale of liquor. The leases were prepared by plaintiff's lawyer, and were signed in his office. Both instruments were introduced in evidence. Under the terms of the lease produced by plaintiff, the lease was absolute for two years, with an option to the lessee for an extension for three years. The optional provision had a clause providing that, if prohibition went into effect during the time of the extension, the lease should be terminated. This clause was slightly ambiguous, and it is this defect in expression which plaintiff seeks to have reformed in his lease (exhibit No. 1). This clause is typewritten throughout. In the duplicate copy produced by defendant at the trial (exhibit No. 2); by the change of a comma to a period, the change of a small letter to a capital, so as to begin a new sentence at that point, and the elimination of the word "or" (the changes being made with pen and ink), the provision that the adoption of prohibition would terminate the lease was made to apply to the whole term of the lease, instead of only to the optional three-year extension period. One lease is not a carbon duplicate of the other, and in both the disputed clauses are typewritten, except that in exhibit 2 the changes noted have been made.

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Plaintiff and his attorney testified that no alterations had been made in either lease at the time it was signed, and that each document as originally prepared was exactly in accordance with the agreement arrived at after the negotiations of the parties. They also testify that the leases never left the attorney's office after they were prepared for signature until they were executed and delivered.

On the other hand, defendant testifies that a few days prior to the signing of the lease he procured from plaintiff, at his office or store, one of the duplicate leases (exhibit No. 2); that he submitted same to one Smith, an employee of a brewing company, who was familiar with such leases; that Smith changed this copy to the form in which it now appears; that the change was called to the attention of plaintiff at his place of business, who agreed to the same; that plaintiff said the other copy was in the office of his attorney, and that he would have it changed to correspond; that defendant took the changed copy to the attorney's office, where it was signed by both parties in the presence of each other, as was the copy produced by plaintiff, but that no change was made in the latter. Defendant went into possession and paid rent until May 1, 1917, when prohibition went into effect. He insists that the lease then terminated, as evidenced by his duplicate lease. Smith testifies substantially to the same effect as to the manner in which the changes were made. There is some other testimony which tends to support defendant's theory.

After a careful consideration of the entire evidence, we are satisfied that the plaintiff has sustained the burden of proof. The testimony on behalf of defendant contains some inherent weakness and improbabilities. The rule in this state, which is different from that in some jurisdictions, is that, in the absence of evidence as to the fact, alterations made in an instrument are presumed to have been made before its execution. *Dorsey v. Conrad*, 49 Neb. 443. But since the duplicates were executed at the

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same time, since the typewritten clause is identical in both, and one of them appears with the original typewriting unchanged, and since all the facts attending the actual execution are in evidence, this removes this presumption, and the question as to how, or when, or with what motive the alteration was made was for the trier of fact to determine under all the evidence.

On the whole case we agree with the district court that plaintiff is entitled to the reformation sought, and that the instrument produced by him expresses the true terms of the lease. The judgment of the district court is

AFFIRMED.

EDWARD PERRY ET AL., APPELLEES, V. RICHARD RITZE
ET AL., APPELLANTS.

FILED MAY 15, 1923. No. 22333.

1. **Specific Performance:** DEFENSES. Want of mutuality in respect to the remedy of specific performance in a suit by vendors of land to enforce the contract of purchase is not a defense, where they complied with, or tendered performance of, their contractual obligations.
2. **Vendor and Purchaser:** DESIGNATION OF GRANTEE AS TRUSTEE. The mere insertion of "trustee" after the name of grantee in a patent for land does not prevent the title from passing to the person named nor prevent him from transferring it to another, where a trust or a beneficiary is not disclosed.
3. **Homestead:** CONVEYANCE. Under the statute in force in 1870, a husband having title to a homestead could transfer it independently of his wife.
4. **Dower.** In 1870 an equitable interest in government land prior to the issuance of a patent was not a freehold estate or an estate of inheritance to which dower attached.
5. **Vendor and Purchaser:** DEEDS: CORRECTION OF ERRORS. In a chain of title to land, as shown by an abstract, mere errors in deeds, such as initials in names and variances in the spelling of names of the same persons, may be cured by affidavits showing the identity of grantors and grantees.

APPEAL from the district court for Wayne county:
ANSON A. WELCH, JUDGE. *Affirmed.*

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A. R. Oleson, for appellants.

A. R. Davis and *C. H. Hendrickson*, *contra*.

Heard before MORRISSEY, C. J., ROSE, DEAN, ALDRICH, and GOOD, JJ., BEGLEY, District Judge.

ROSE, J.

This is a suit in equity to enforce specific performance of a contract to purchase real estate. The property consists, with improvements, of a quarter section and two 40-acre tracts of land near Wayne. Plaintiffs were vendors and defendants were vendees. The making of the contract July 28, 1920, is pleaded in the petition and admitted in the answer. The date fixed by the parties for performance was March 1, 1921. The purchase price was \$80,000, of which defendants paid \$11,000 in cash. Defendants agreed to assume a mortgage for \$50,000, to pay \$14,000 March 1, 1921, and to give plaintiffs a second mortgage on the land for \$5,000, payable March 1, 1923. Plaintiffs were to furnish "a warranty deed, and a good, merchantable abstract of title, on or before March 1, 1921," and they pleaded a tender of both. Defendants resisted specific performance on the ground that the contract was void for want of mutuality, and they also pleaded plaintiffs' failure to furnish an abstract showing "a good and merchantable title," and prayed for a cancelation of the contract and for a judgment for that part of the purchase price paid in cash. The district court found the issues in favor of plaintiffs and ordered specific performance. Defendants have appealed.

Is want of mutuality a defense? It is argued that specific performance as a remedy was available to plaintiffs but not to defendants, and that therefore the mutuality essential to a valid contract was wanting. The plea is that plaintiffs were married, that the wives did not sign the contract of sale, and that consequently it could not have been specifically enforced in a contested suit by defendants. Both plaintiffs executed a warranty deed in which the wife of each joined as a grantor and this

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was tendered by plaintiffs in performance of the contract in that respect. While the opinions on this subject are not harmonious in different jurisdictions, the rule in Nebraska is that want of mutuality in respect to the remedy of specific performance in a suit by vendors to enforce the contract of purchase is not a defense, where they complied with, or tendered performance of, their contractual obligations. *Bigler v. Baker*, 40 Neb. 325.

Did the warranty deed tendered by plaintiffs to defendants convey "a good and merchantable title?" One objection to the abstract is based on entries showing that the United States by patent dated July 1, 1871, conveyed to "Moses B. I. Goddard, trustee," 80 acres of the land in controversy, and that the latter executed a "special warranty deed" to Robert H. I. Goddard, a grantor in the chain of title. It is argued that the power of the trustee to make the transfer is not shown and that the interests of the beneficiaries of the trust may be outstanding estates. The position thus taken is untenable. The patent did not disclose a trust or the name of a beneficiary. The mere insertion of "trustee" after the name of the grantee did not prevent the title from passing to the person named nor prevent him from transferring it to another. *Farrell v. Reed*, 46 Neb. 258; *Cowell v. Springs Co.*, 100 U. S. 55. In the argument on this point reference is made to *Snyder v. Collier*, 85 Neb. 552, containing an expression to the effect that the word "trustee," following the name of grantee in a deed, "is sufficient to put those dealing with him concerning the property upon reasonable inquiry as to the existence and nature of the trust." There the person described as "trustee" acquired in that capacity title for the beneficiaries of an existing trust. In the present instance inquiry for 50 years would not have disclosed an unexecuted trust or a beneficiary with an outstanding interest under the patent. A statute passed since the decision in *Snyder v. Collier*, 85 Neb. 552, was rendered, and before the contract of sale in the present case was executed, makes conclusive the pre-

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sumption of the patentee's authority to transfer title. Comp. St. 1922, sec. 5659.

In the chain of title to a quarter section of the land in controversy objection is made to a deed executed by J. M. Searl, without anything to show that he was unmarried; William Stewart being named as grantee. In this connection defendants say the possibility that Searl had a wife with an outstanding interest makes the title unmarketable. The deed in question was executed October 11, 1870. At that time a husband having title to his homestead could transfer it independently of his wife. Referring to the homestead law then in force the following language was used in an early case:

"The legislature never intended, by this statute, to assume a guardianship over the owner of a homestead, and render him disqualified to make valid contracts respecting it. It imposes no restraint upon him whatever in this respect. Even the wife, when the title is in the husband, has no power to prevent him from making such disposition of it as he may think best." *Rector v. Rotton*, 3 Neb. 171.

This language was quoted with approval in *State Bank v. Carson*, 4 Neb. 498, and in *Schields v. Horbach*, 49 Neb. 262.

Assuming that Searl had a wife when he executed his conveyance October 11, 1870, she did not have a dower interest in the land, because he did not then have a freehold estate or an estate of inheritance to which dower could attach. The patent to this tract was issued to William Stewart, assignee of Searl, November 10, 1870, a month after Searl had transferred his equitable interest to Stewart. This interest was not affected by dower. *Norfolk Nat. Bank v. Wood, Bancroft & Co.*, 33 Neb. 113; *Hall v. Crabb*, 56 Neb. 392.

Other objections to the title are based on initials in names and on variances in the spelling of names in deeds. Minor errors of this kind are corrected by affidavits properly indentifying grantors and grantees.

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There are still further criticisms relating to dormant judgments and to liens not properly satisfied of record. Some of the objections are met by the production of public records, others by judicial decrees, and the rest by affidavits. Upon a critical examination of all the objections to the abstract the conclusion is that it shows a good and merchantable title in plaintiffs. In addition, title by adverse possession is conclusively shown. It follows that defendants have no legal or equitable right to a rescission of the contract of purchase. Specific performance, therefore, was properly decreed.

AFFIRMED.

THOMAS G. DINSDALE, APPELLANT, v. SPRAGUE TIRE & RUBBER COMPANY, APPELLEE.

FILED MAY 15, 1923. No. 22342.

1. **Principal and Agent:** UNAUTHORIZED CONTRACT: RETENTION OF BENEFITS. A principal cannot knowingly retain the benefits of a sale procured by a soliciting agent and escape legal obligations assumed by the agent in the name of the principal as a condition of the purchase.
2. **Corporations:** SALE OF STOCK: CONTRACT. Where soliciting agents of a corporation sell some of its capital stock, without notice of any limitation on their power, and at the same time execute in writing, as a condition of the purchase, an option granting to the purchaser the right to cancel the sale, if the corporation fails to resell within six months half the capital stock thus sold for the price originally paid for the whole, the subscription and the option may be considered parts of the same transaction, constituting a single contract.
3. ———: ———: SECRET AGREEMENT. The doctrine that a secret agreement to procure capital stock at a price less than the uniform price paid by other stockholders is void may not apply to a sale at the established price on condition of granting to the purchaser an option to cancel the sale, if the corporation fails to resell within six months half his stock at the price originally paid for the whole.
4. ———: ———: POWERS. A corporation selling its capital stock under a subscription, providing on its face that shares sold without payment in cash shall be retained by the corporation as collateral for unpaid notes for the purchase price, may be held to have power

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to buy, hold and resell its own capital stock, in absence of proof that it has no such power.

5. ———: ———: *FRAUD*. It is not necessarily a fraud upon a corporation and its stockholders generally for a purchaser of some of its capital stock to exact from its soliciting agents, as a condition of the purchase, a written option granting to him the right to cancel his purchase, if the corporation fails to resell within six months half the stock purchased at the price originally paid for the whole.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. Reversed.

J. C. Martin and Sullivan, Wright & Thummel, for appellant.

Gaines, Van Orsdel & Gaines, contra.

Heard before *MORRISSEY, C. J., LETTON, ROSE* and *DEAN, JJ., BEGLEY, District Judge.*

ROSE, J.

This is a suit in equity to cancel a contract for the purchase of capital stock issued by a corporation, to require the surrender of a note for half the purchase price, and to recover back the amount paid for the other half. Plaintiff is the purchaser and defendant is the corporation that issued and sold the stock. The sale contract was executed July 24, 1919. The stock purchased consisted of 100 shares, each of the par value of \$100. The purchase price was \$7,500, paid by two notes of \$3,750 each, due in 6 months. The right of plaintiff to the relief demanded is based on written terms of the purchase. His theory of the case is that the sale was a conditional one and granted him an option to cancel it, a right which he exercised according to contractual conditions. The controversy arose in the following manner: Defendant incorporated for the purpose of manufacturing tires and appointed Weaver & Meredith fiscal agents to sell its capital stock. They supplied E. A. Jenkins and George Hasman with subscription blanks and sent them out as soliciting agents to procure subscriptions. Hasman and Jenkins, without immediate success, importuned plain-

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tiff, a dealer in live stock, hay and grain at Palmer, to purchase stock, but finally induced him, July 24, 1919, to sign the subscription and the notes described. Before closing the transactions plaintiff exacted for the subscription and the notes a receipt bearing the signature of defendant by Jenkins and Hasman, agents. On the back of it there is the following agreement:

“Palmer, Neb. July 24, 1919.

“It is agreed that if we do not sell 50 shares of stock in the Sprague Tire & Rubber Co. belonging to Mr. Tom Dinsdale for \$150 per share before the notes given in payment for the same become due that the company will, at Mr. Dinsdale's option, either cancel this agreement or, by the payment of the interest due thereon, extend the notes from time to time until the same are paid.

“Sprague Tire & Rubber Co.,

“By E. A. Jenkins, Special Rept.

“Geo. Hasman, Agent.”

One of the notes was sold to an innocent purchaser to whom plaintiff bound himself for payment. The proceeds of the sale of this note, less the commission of the agents for selling the capital stock, were sent to and retained by defendant with the subscription and the other note. The capital stock for which plaintiff subscribed was never delivered to him, but was held by defendant as collateral security for the unpaid note. Defendant did not resell for plaintiff, within 6 months, 50 shares at \$150 a share. Before the time for exercising the option expired, plaintiff made a futile demand for the cancelation of the subscription, for the surrender of the unpaid note, and for the amount of the note transferred to the innocent holder. This suit was begun to obtain the relief thus demanded. On issues raised by the pleadings, the facts narrated are either admitted or conclusively established by the proofs.

The defenses may be summarized as follows: The soliciting agents had no authority to enter into the agreement indorsed on the back of the receipt. Without

knowledge of the unauthorized agreement, defendant accepted the subscription, the unpaid note and the partial payment out of the proceeds of the other note. The sale of all capital stock was open to purchasers on uniform terms prescribed in the subscription contracts supplied to the soliciting agents. Plaintiff exacted the fraudulent conditions. The unauthorized agreement was void as a fraud upon other subscribers and upon defendant. Plaintiff was an active participant in the fraud and is bound by his subscription as an unconditional purchaser without any legal right to enforce the void option to cancel the purchase upon failure of defendant to resell half his capital stock at the price paid for the whole. The facts upon which these defenses are based appear in an answer pleading a counterclaim for judgment on the unpaid note. The trial in the district court resulted in a dismissal of plaintiff's suit and in a judgment in favor of defendant for the full amount of its counterclaim. Plaintiff has appealed.

Did the trial court take an erroneous view of the facts and the law? The inquiry is not complicated by parol evidence contradicting a written instrument. The transactions were reduced to writing. The soliciting agents represented defendant alone. Through them plaintiff dealt with defendant. They approached him with a form of subscription furnished by defendant, but containing no warning that their powers were limited. The agents appeared to have the powers which they exercised on behalf of defendant in executing the option. They could not have sold the stock to plaintiff without granting to him the right to cancel the sale on the terms to which they subscribed on behalf of their principal. The sale itself depended on the agency through which the option was executed. After defendant learned the conditions of the sale it retained the subscription thus procured and refused to restore the consideration to plaintiff. The agents, by virtue of their actual authority to solicit subscriptions without notice of limitations on

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their powers, not only had the apparent or ostensible authority which plaintiff recognized as genuine in exacting the option, but defendant itself, after it acquired knowledge of what they had done, retained the fruits of their efforts and thus adopted the means employed by them in consummating the sale. These are circumstances under which a principal cannot retain the benefits of a sale procured by a soliciting agent and escape the obligations assumed by the agent in the name of the principal as conditions of the purchase.

What is the nature of the transactions? If legitimate, they amount to a conditional sale with a buyer's option to cancel the purchase upon failure of the seller to resell half the stock within 6 months at the price of the whole. All terms of both the sale and the option are parts of the same transactions, constitute a single contract, and must stand or fall together, unless plaintiff is answerable for some wrong amounting to a fraud upon other purchasers of stock.

Defendant invokes the rule that a secret agreement by a purchaser to buy capital stock at a price less than other purchasers similarly situated are required to pay is a fraud upon them and upon creditors. Defendant received from plaintiff the regular price in the form of cash and a collectable note. These considerations would have been retainable had defendant resold 50 shares of plaintiff's stock at \$150 a share. In that event defendant would have received from plaintiff the same price as that paid by other stockholders. Owing to the failure of defendant to prevent the conditional sale from becoming absolute, it has on hand the shares of stock involved in the transactions. If the stock cannot be resold at the original price, the loss is attributable to defendant, and not to plaintiff who did nothing to cause it except to exercise the option granted in writing by defendant as a condition of his purchase. The doctrine invoked, therefore, is not applicable to the facts.

The record does not show that defendant, while mak-

ing the sale to plaintiff, was without power to buy, hold and resell its own stock. The subscription declared on its face: "It is agreed that the shares of stock are to be held as collateral to the note of the purchaser." This was not the utterance of agents. It was a condition of sale demanded by defendant itself. The pledge implies, if it does not express, power of the corporation to hold and sell its stock for the benefit of itself and its stockholders. Want of power as a defense is not proved.

Did plaintiff by joining in the option commit a fraud which defeated the cancelation of the purchase? There was no evidence of fraud on his part; unless fraud is inferable from the condition relating to the resale of half the shares purchased for the price conditionally paid for the whole. Under the circumstances this does not establish fraud. Profit in some form is the motive for the purchase of corporate stock. Without the hope of gain no one would make an investment in such property. In a period of inflation, during which prices of property doubled in a short time, an agreement for the payment of twice what corporate stock cost, as a condition of the resale, did not of itself constitute fraud on the part of plaintiff who had no means of knowing how fast defendant's stock would increase in value, but the agents of defendant represented that half of what he bought could be sold again within 6 months for double its original cost. Plaintiff, in executing the notes for the purchase price, risked his credit on that basis alone, as he had a right to do, and did not himself commit any fraud.

There was no defense to the petition and the prayer thereof should have been granted. The counterclaim should have been dismissed. For the purpose of granting this relief, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

Poulos v. Skrekas.

**BEN POULOS ET AL., APPELLEES, v. JACK SKREKAS,
APPELLANT.**

FILED MAY 15, 1923. No. 22365.

Landlord and Tenant: LEASE: CANCELAN. An unreasonable delay by lessor in performing his agreement to equip a leased room for a confectionery store may justify a court of equity in canceling the lease, notes given in advance by lessees for the purchase price of the equipment, and a chattel mortgage on the equipment to secure the notes, where lessees have not contributed to or waived the delay or taken possession of the leased premises.

APPEAL from the district court for Douglas county:
ARTHUR C. WAKELEY, JUDGE. Affirmed.

Martin L. Sugarman, for appellant.

Wayne E. Sawtell, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

ROSE, J.

This is a suit in equity to cancel a lease for a room to be equipped by lessor and used by lessees for a confectionery store in Omaha, notes aggregating \$5,400 given in advance by lessees to lessor for the purchase price of the equipment, and a chattel mortgage on the equipment to secure payment of the notes. Judgment for a cash payment of \$600 on the equipment is also sought. Plaintiffs are lessees, and Jack Skrekas, lessor, and his partner are defendants. The lease was dated April 8, 1920, and the room was to be equipped by lessor for business on or before July 1, 1920, but it was not then ready. Defendants admitted the making of the lease, but denied other material allegations of the petition. The trial court upon a full hearing granted the prayer of the petition, and defendants have appealed.

The only question presented is the sufficiency of the evidence to entitle plaintiffs to equitable relief. Lessor did not equip the leased room or have it ready for occupancy on or before July 20, 1920. It was not equipped until September. Plaintiffs never took possession. As

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early as October lessor and his partner were using the leased premises and the equipment to carry on the enterprise for which plaintiffs had procured the lease. It is shown by a preponderance of the evidence that futile demands for performance were made, that plaintiffs did not contribute to or waive the delay, and that it was unreasonable under the circumstances and kept plaintiffs out of business during a busy season of the year, while their notes for the purchase price of the equipment and their obligations for rents were outstanding. The trial court was right in granting equitable relief to plaintiffs.

AFFIRMED.

WILLIAM F. SMITH, APPELLEE, V. FRED LEU ET AL.,
APPELLANTS.

FILED MAY 15, 1923. No. 22398.

1. **Fraud: PLEADING.** In an action by a purchaser of personal property to recover damages for false representations inducing the sale, his petition should allege that he relied on the false representations.
2. ———: **MEASURE OF DAMAGES.** The measure of damages in an action by a purchaser for false representations in the sale of personal property permanently retained by him, if worth anything, is generally the difference between its actual and represented value when sold.

APPEAL from the district court for Lincoln county:
HANSON M. GRIMES, JUDGE. *Reversed.*

George N. Gibbs, for appellants.

W. E. Flynn, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and
DEAN, JJ., BEGLEY, District Judge.

ROSE, J.

This is an action to recover damages for false representations by which defendants induced plaintiff to purchase from them the lease of a lot occupied by them as a garage, the property connected with it and the business therein conducted. The purchase price was paid by means of a certificate of deposit for \$1,000 issued to plain-

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tiff by the Bank of Lincoln county at Hershey, with accrued interest amounting to \$20, and plaintiff's personal check on the same bank for \$2,000. On this paper defendants procured from plaintiff \$3,020, the amount of damages claimed. This was accomplished by fraudulent representations, according to the petition, without any consideration whatever, while plaintiff was helpless in a hospital and mentally incapable of transacting business. In the answer of defendants they denied the fraud charged, pleaded their contract of sale, and alleged performance on their part. Upon a trial of the issues the jury rendered a verdict in favor of plaintiff for \$3,245.50. From a judgment thereon defendants have appealed.

The overruling of a demurrer to the petition is the first assignment of error presented. It is insisted that the petition does not contain the necessary allegation that plaintiff relied on the fraudulent representations pleaded by him. Unfortunately the petition is a crude and ungrammatical pleading, mingling material and immaterial facts. Reliance on the false representations pleaded is not directly alleged in, but is implied by, the petition which might be held sufficient after a trial on the merits, including the issue of such reliance, if the record were otherwise free from error; but the petition was assailed by a preliminary demurrer and plaintiff should have been required to amend, a right which has not been lost.

The principal assignment of error is directed to the following language in one of the instructions:

"If the jury believe, from the evidence, that at the time of making the contract and purchase involved herein, you find that plaintiff's mind was so weak, unsound, or diseased, that he was incapable of understanding the nature of his contract, the nature of the acts to be by him performed thereunder, or the consequence of his contract, then the two minds did not meet, and because of such fact, the contract is not binding, and you should find for plaintiff in the amount paid thereon, with interest there-

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on, at the rate of seven per cent. per annum from November 1, 1919, to this date."

This was not applicable to the issues or the proofs. The trial court properly construed the petition to be one for damages for false representations. Otherwise plaintiff did not plead facts constituting a cause of action. He retained what he received under the contract and did not rescind it. Plaintiff did not plead a cause of action to recover back the consideration for a rescinded purchase. The measure of damages for false representations was misstated by the trial court and the jury rendered a verdict for the amount authorized by the erroneous direction—the consideration paid by plaintiff and interest. The rascality constituting the fraud and the worthlessness of what defendants pretended to sell to plaintiff for \$3,020 were vehemently urged to show there was no prejudicial error in the instruction. The fallacy in the argument, however, is that it disregards the jury as triers of fact on the issue of damages. Under the contract alleged by plaintiff to have been procured by fraud, he took possession of the garage and occupied it for a time as a business venture. There is evidence tending to prove that he acquired from defendants and retained valuable rights and property under his purchase. These the jury, under the instruction quoted, were authorized to, and did, disregard in determining the amount of plaintiff's award. If the privileges, rights and property acquired by plaintiff were of no value, contrary to some of the testimony, the jury should have been permitted to find that fact. The measure of damages in an action by a purchaser for false representations in the sale of personal property permanently retained by him, if worth anything, is generally the difference between its actual and represented value when sold. The error in the instruction, therefore, is obviously prejudicial to defendants. The judgment is reversed and the cause remanded for further proceedings.

REVERSED.

Greenwood Cemetery v. City of Wayne.

GREENWOOD CEMETERY OF WAYNE ET AL., APPELLANTS, V.
CITY OF WAYNE ET AL., APPELLEES.

FILED MAY 15, 1923. No. 23085.

- 1: **Municipal Corporations:** PAVING: EXEMPTION OF BURIAL LOTS. Under a statute exempting from execution only burial lots sold by a cemetery association for the sole purpose of interments, unsold lots are not exempt from an assessment for special benefits conferred by the paving of a street.
2. ———: ———: SPECIAL ASSESSMENTS: TAXATION. A municipal assessment for a special benefit accruing to private property through a public improvement is not "taxation" within the meaning of a statute exempting property from taxation.
3. ———: ———: ———: EXEMPTION. A statute exempting property from "sale on execution on any judgment" does not apply to a sale of property to pay an assessment by a city for special benefits conferred by a public improvement.

APPEAL from the district court for Wayne county:
ANSON A. WELCH, JUDGE. *Affirmed.*

C. H. Hendrickson, for appellants.

F. S. Berry, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

ROSE, J.

This is a proceeding to review an assessment of property of a cemetery association for special benefits derived from the paving of a public street. The board of equalization of the city of Wayne made the assessment. The property affected belongs to the Greenwood Cemetery, a private corporation organized under statutory authority for the purposes indicated by its name. Comp. St. 1922, sec. 588. The proceedings of the city in paving the street and in thus benefiting the cemetery association are conceded to be regular, but the validity of the assessment for special benefits is said to be void for the reason that cemetery property is exempted by statute. On petition in error the assessment by the board of equalization was reviewed in the district court, where it was held that the

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cemetery was specially benefited by the pavement to the extent of \$3,437.76. From an order permitting the payment of this sum out of general funds available for improvements the association has appealed.

Did the legislature exempt the property of cemeteries from assessments for local improvements? In absence of an exemption the city that paved the street or avenue had power to levy a special assessment on adjacent property of the cemetery in proportion to the special benefits conferred. Comp. St. 1922, sec. 4283. The street or avenue improved led to the cemetery and its land was adjacent thereto. A purpose to which funds of the cemetery may be appropriated is the improvement of avenues leading thereto. Comp. St. 1922, sec. 592. A statute invoked to show exemption from assessments for benefits declares:

"Burial lots sold by such association shall be for the sole purpose of interments, and shall be subject to the rules prescribed by the association, and shall be exempt from taxation, execution, attachment, or any other claim, lien or process whatever, if used exclusively for burial purposes, and in no wise with a view to profit." Comp. St. 1922, sec. 593.

Only "burial lots sold" for the "sole purpose of interments" are exempted, "if used exclusively for burial purposes." It is shown without dispute that the cemetery has 420 unsold burial lots. It is therefore clear that these lots are not exempted by the statute quoted.

The following legislation, however, is cited to show that unsold burial lots cannot be sold under any form of legal process:

"Lands appropriated and set apart as burial grounds, either for public or private use, and so recorded in the county clerk's office of the county where such lands are situated, shall not be subject to sale on execution on any judgment to be hereafter recovered, to taxation, to dower, nor to compulsory partition." Comp. St. 1922, sec. 596.

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It is settled law that a municipal assessment for a special benefit accruing to real estate through a public improvement is not "taxation" as that word is used in the statute.

The "sale" forbidden is a sale "on execution on any judgment." The "judgment" to which reference is made by the legislature is a judgment at law in a court of justice, and does not include an assessment by a municipal board of equalization for a special benefit conferred by the paving of a street. Exemption is an exception to the general rule and to be available must be found in the terms of the statute. It seems clear that the unsold lots are not exempt from the assessment for special benefits. It follows that the city board of equalization had power to make an assessment for the proper benefits, which are shown to be \$3,437.76.

Happily a forced sale of lots is unnecessary. The cemetery has on hand available funds amounting to \$3,799.05 which may legally be applied to the expenses of improvements. Out of this fund the entire assessment may be paid at once or payments may be made as they fall due.

AFFIRMED.

COMMERCIAL NATIONAL BANK OF COLUMBUS, APPELLER, v.

S. D. RUFF ET AL., APPELLANTS: JOHN C.

BYRNES ET AL., APPELLEES.

FILED MAY 15, 1923. No. 22308.

1. **Appeal:** CONFLICTING EVIDENCE. Where a jury is waived and the witnesses in respect of material issues are orally examined before the court, and where in such case the evidence is conflicting, and the case is appealed, we are not unmindful of the fact that the trial court had a better opportunity to judge of the truth or the falsity of the statements of the witnesses than a reviewing court can have from a printed record.
2. **Record** examined, and *held* that the judgment is without prejudicial error.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

J. J. Gleeson and Dolezal, Spear & Mapes, for appellants.

Albert & Wagner and Cain & Johnson, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and DEAN, JJ., BEGLEY, District Judge.

DEAN, J.

Defendants, who are husband and wife, executed and delivered to John C. Byrnes, September 8, 1919, a promissory note in the sum of \$2,000, and November 1, 1919, they executed and delivered to Byrnes another promissory note for \$1,500; Mr. Ruff signing both notes as surety. The notes were made payable to Byrnes' order; the latter note, however, was payable at the plaintiff bank. Both notes were given as a first payment on the purchase price of a farm in Boone county and are in the usual negotiable instrument form and drawing 7 per cent. annual interest. March 1, 1920, the notes matured. Plaintiff alleged, in the usual form, that it bought the notes from Byrnes for a valuable consideration in the usual course of business and without knowledge of infirmities or of any defenses claimed by the makers. John C. Byrnes and C. A. Miller, his alleged partner, were made parties defendant on the defendants' application. In their amended answer and cross-petition the Ruffs admitted the execution and delivery of the notes, but alleged that they were obtained by fraud and misrepresentation practiced upon them by Byrnes and Miller, with the bank's connivance, and prayed that the notes be held for naught. A jury was waived. When the parties rested the court took the case under advisement and thereafter rendered judgment in favor of plaintiff and against S. D. Ruff and Elizabeth Ruff for \$4,053.13, the full amount represented by the notes. The court further found generally in favor of defendants

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John C. Byrnes and C. A. Miller, as against defendants S. D. Ruff and Elizabeth Ruff, and decreed that their cross-petition be dismissed. From the foregoing judgment defendants Ruff appealed.

In defendants' "substitute answer and cross-petition" they renewed the allegations of the former answers as against the bank. With respect to the cross-defendants, Byrnes and Miller, they alleged generally that they conspired together for the purpose of cheating and defrauding them; that a contract of purchase was entered into September 8, 1919, between Byrnes as seller and Mrs. Elizabeth Ruff as buyer of the Boone county farm, and that by its terms Mrs. Ruff agreed to pay \$51,842.50 for the farm, the notes in controversy representing the first payment, the contract providing for subsequent payments which were to be secured by a mortgage on the land; the purchaser, however, by the terms of the contract, reserving to herself the privilege of paying all or any part of the purchase price March 1, 1920.

However, it is alleged by the Ruffs that it was orally agreed between them and Byrnes, the latter being represented by Miller, that the notes in suit should be retained in Byrnes' possession until Mrs. Ruff could sell her Dodge county farm, or otherwise raise the money, and that if she could not sell the farm or raise the money some other way the notes and the contract should be returned to her; that they relied upon the promises and representations so made and would not have delivered the notes but for the aforesaid verbal agreement; that about October 15, 1919, Mrs. Ruff being unable to sell her farm in Dodge county demanded a return of the notes and notified Byrnes and Miller that she, Mrs. Ruff, would proceed no further in the enterprise and that they were at liberty to sell the real estate in question to other parties. It is charged that neither Byrnes nor Miller ever intended to carry out their agreement but that the transaction was a scheme on their part to cheat and defraud the Ruffs of their money. It is not alleged that the land purchased

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by defendants was of less value than that represented by the sellers at the time.

In their answer to the cross-petition of the defendants Ruff, both Byrnes and Miller denied all of the material allegations therein, and alleged that defendant Byrnes, "ever since the execution of the said contract, has been and still is able, ready and willing to keep and perform all and singular of the terms and conditions thereof on his part to be kept and performed, and has kept and performed the same in all respects, so far as thereunto permitted by said cross-petitioner, Elizabeth Ruff."

In support of the allegations of their cross-petition both Mr. and Mrs. Ruff testified that the oral agreement was made. This was denied by both Byrnes and Miller. Besides, it was shown that the Ruffs paid the interest on one of the notes and renewed it. So that their conduct is shown to be inconsistent with their plea that the notes were delivered conditionally to Miller for Byrnes. At best they are mistaken in their contention.

It plainly appears that Byrnes was able, willing and ready to perform his part of the contract. He tendered a valid deed in court, but the offer was refused. The tender, however, was not incumbent on him in view of the refusal of his adversary to comply with the conditions of the contract on her part to be performed. The defendants Ruff did not offer to perform their part of the contract which they entered into and which they themselves pleaded as an exhibit. Under the facts before us they cannot now be heard to say that plaintiff was in default.

That the plaintiff bank purchased the notes without knowledge of any infirmities therein and without knowledge of any defenses by the makers appears from the evidence. The president of the bank testified that he bought them from Mr. Byrnes on behalf of the bank, and that he had not heard of the claim, since made by defendants, that Mr. Byrnes would hold the notes until the makers disposed of certain land owned by them, and that he had

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no knowledge that Mr. or Mrs. Ruff claimed any defense against the notes. He further testified that when the notes were purchased he, as was his custom, asked Mr. Byrnes about the responsibility of the makers and was informed that they had a farm near North Bend.

Where a jury is waived and the witnesses in respect of material issues are orally examined before the court, and where in such case the evidence is conflicting, and the case is appealed, we are not unmindful of the fact that the trial court had a better opportunity to judge of the truth or the falsity of the statements of the witnesses than a reviewing court can have from a printed record.

Other assignments of alleged error are urged by counsel, but upon examination we find that prejudicial error does not appear.

The judgment is

AFFIRMED.

CHARLES J. MILLER, APPELLEE, V. CENTRAL TAXI COMPANY,
APPELLANT.

FILED MAY 15, 1923. No. 22359.

1. **Evidence.** Ordinarily a question involving the rate of speed of a motor-propelled vehicle is not a question for expert testimony. *Oakes v. Omaha & C. B. Street R. Co.*, 104 Neb. 788.
2. **Trial: WITNESSES: CROSS-EXAMINATION.** Where a plaintiff in a personal injury action seeks by appropriate interrogatories on the cross-examination to discover whether the defendant is indemnified from loss by an insurance company, it is error for the court to sustain an objection to interrogatories which tend to develop the fact on that question.
3. **Appeal: REMITTITUR.** Where plaintiff in a personal injury action recovers a verdict and the trial court directs a remittitur and the defendant appeals, this court will on request of plaintiff, in a proper case, set aside such remittitur either in whole or in part as the evidence may warrant.
4. **Trial.** It is elementary that the jury and not the court is the trier of questions of fact.
5. **Damages.** Evidence examined, and held that the required remittitur

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is excessive, and all over \$2,000 thereof is ordered vacated under authority of section 9154, Comp. St. 1922.

APPEAL from the district court for Douglas county:
LEE S. ESTELLE, JUDGE. *Affirmed as modified.*

Brome & Ramsey and J. P. Uvick, for appellant.

John M. Berger, George A. Keyser and James C. Kinsler, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN and DAY, JJ.

DEAN, J.

This action was brought to recover for personal injuries sustained by plaintiff, as alleged, in a collision between plaintiff's car, which he was driving, and one of defendant's taxicabs driven by an employee of defendant in a negligent and wrongful manner and at an excessive and careless rate of speed. Plaintiff recovered a verdict for \$9,250 for personal injuries and \$350 for his damaged car, or a total of \$9,600. At the trial the late Judge Lee S. Estelle presided. Subsequent to Judge Estelle's death his Honor Judge Charles A. Goss overruled defendant's motion for a new trial on condition that a remittitur be filed in the sum of \$4,250. Plaintiff, in compliance with the order, filed the remittitur and judgment was rendered in the sum of \$5,350, from which defendant has appealed.

Immediately before the accident plaintiff was employed by the Burlington railroad as a locomotive fireman on a switch engine and had been so engaged about seven years. He was then earning from \$125 to \$150 a month. At the time he was a strong and able-bodied man 42 years of age. The accident happened on the Eleventh street viaduct at Omaha, February 21, 1919, about 11:30 at night. Plaintiff was driving south in a Ford automobile. His wife was seated at his side in the front seat and two of his married sisters and a baby occupied the rear seat. The party was returning from a social visit with friends. Defendant's taxicab was driven by

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a man named Sullivan, an employee of defendant. He had three passengers, two women and one man, and was driving from the south. The collision occurred not far from the south end of the viaduct, which is about two blocks in length.

When the taxicab was about a block away, plaintiff testified that he first saw its approaching lights; that it came upon the viaduct in a "zigzag" manner and at a speed of from 40 to 45 miles an hour; that the speed of his car at no time exceeded 10 or 12 miles an hour; that when the taxicab struck his car he had driven close up to the west or righthand side of the viaduct and was about 6 inches from the sidewalk, and was just bringing his car to a stop when the impact occurred. In the matter of the position and the speed of the respective cars his evidence was corroborated by Mrs. Tams who was an occupant of the car.

To show the force of the impact, it may be added that the evidence tends to prove that the right front wheel was broken off, the axle and fender were broken, the frame of the car was bent and the top was broken down. It was made worthless for practical purposes, but was valued at from \$80 to \$100. It also appears that the taxicab continued on its course about 15 or 20 feet after the collision, ran over the opposite sidewalk and then turned over on its side. Its occupants were not seriously if at all injured. Plaintiff testified that when he got out of the car the driver of the taxicab was leaning up against the banister of the viaduct and that he was drunk. On the cross-examination he testified that the driver's conversation and manner indicated drunkenness and that he had the smell of intoxicating liquor on his breath.

In respect of his injuries plaintiff testified that the top of his head was severely bruised and cut and his neck was injured and that a throat trouble was induced; that a piece of broken glass from the windshield went through his cheek and that he had other cuts on his face which were less severe; his hand was injured and

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became swollen and in a week or so the swelling began to disappear and he discovered that a bone in his hand was broken; that as a result of the injuries to his head he had almost daily headaches and dizzy spells and at times would stagger and almost fall, and that he could not stoop to shovel coal into the locomotive firebox for any considerable length of time. He testified that he returned to his work as fireman on a switch engine about 10 days or two weeks after the accident; that he worked a few days and on account of headaches and dizziness and the injury to his hand he was laid off; that he continued to work intermittently at his occupation one-half or two-thirds of the time for from three to five months; that while he was so occupied the engineer changed work with him and let him run the engine, while working in the railroad yards, while he, the engineer, did the firing, and that but for the engineer's assistance he could not have continued in his work. Plaintiff further testified that he suffered much pain from his injuries and that he was at times prostrated by nervous attacks; that his sleep was broken and he was unable to rest, and that at the end of four or five months, on account of his injuries, he was compelled to discontinue work on the engine. Subsequently he obtained temporary employment with a brother-in-law where his work was light and his earnings were about \$4 a day. It also appears that for a time thereafter he again worked for the railroad company and wheeled sand to a drying device; that for a part of the time he shoveled the sand and at other times it was shoveled by others. When asked to explain how he could at all shovel coal into the firebox of a locomotive or shovel sand, he testified that when using a shovel he was left-handed and that the left hand consequently bore the load, and that with the thumb and the forepart of his right hand he could manipulate the outer end of the shovel. After he left the Burlington he took a contract to run a coal chute which was operated by a gasoline engine, but he

had to have a man to start the engine and he could then operate it. The contention is that the injuries to his head and neck and right hand are permanent, and that from the injuries generally he suffered a nervous shock which has resulted, as the doctors testified, in traumatic neurasthenia.

Plaintiff's evidence in regard to changing work with the engineer, and his assistance in firing the engine, and his evidence with respect to the manner of using the shovel while firing was corroborated by the engineer. He testified that a locomotive fireman has to be left-handed because he must stand near the left-hand side of the engine when shoveling coal into the firebox. The engineer also testified that after the accident plaintiff frequently complained of headaches and dizziness, but that he made no such complaint before he was injured.

Three or four physicians testified at great length with respect to plaintiff's injuries. One made an examination about 15 months after the accident and this was only a few days before the trial. He testified that one of the incisions on plaintiff's cheek extended clear through to the inside, but that aside from the scars left on his face no other bad result should be anticipated; that he found a scar about three-fourths of an inch long on top of plaintiff's head which was due to a cut or a blow; that there were indications of a scar on his right hand, and on examination he found a diminished strength of grip which would doubtless be permanent; that plaintiff had some disorder in the muscles and ligaments in the right side of the neck, and that they were tender to the touch and responded to pressure, and these disorders had a marked tendency toward a permanent condition; that plaintiff was very nervous, restless and uneasy; that he did not have control of himself and was without normal poise and rest; that the tenderness of the tendons in the neck was due to irritation of the nerve which supplied that part of the body; that the dizziness of which plaintiff complained was probably due to the brain substance

having been injured from concussion, and that there might be a continued hemorrhage of brain tissue resulting from laceration. His expressed opinion was that plaintiff's then condition probably resulted from the injuries that he found on his head and neck, and that the general physical state and the depressed condition would naturally result from such injuries as plaintiff appeared to have sustained. With respect to the continuation of pain in the future the doctor testified: "The probability is that the symptoms will continue, varying perhaps in character, or may diminish some." He further testified that the results of head injury are very numerous and very indeterminate and almost any form of nervous disorder may result from a blow on the head.

Another physician corroborated the material evidence of the physician whose evidence has just been reviewed. In addition thereto he went somewhat into detail and testified that in plaintiff's right arm he found that the reflexes were wholly retarded from the shoulder down, and that he discovered a displacement of the right index finger or knuckle and a callous condition on the wrist which indicated either a fracture or a displacement of the small bones; that he believed the injury to the hand was permanent, and that the affection of the neck was the result of nerve injury which would gradually increase; that with respect to dizziness he put the plaintiff through certain movements which did not seem to induce unbalancing, but when the patient looked down or backward he lost his balance and staggered slightly. He further testified that plaintiff's condition "expresses itself in a tremor of the arms, and also his legs shaky in some degree."

A physician called by the court was interrogated with respect to the injuries generally and the consequent nervous shock which was the outgrowth of the accident. He testified: "There has been probably some impairment, but I think it is largely of mental origin. Q. Of mental origin? A. Yes, sir. Q. And being of mental origin,

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to what would you attribute it, conceding the man to have been perfectly normal prior to his receiving the injury or shock which was occasioned by a collision between two automobiles, one going at the rate of 40 miles an hour, and the impact being of such a character that the large taxicar was thrown a distance of 10 or 15 feet? Would you not say that that would contribute to it; that could be easily a contributing factor to the psychological condition? A. Yes. Q. And the shock or the effect connected with the injury which you have discovered on this man's head, notwithstanding the fact that it had been practically healed, would produce what you have just called 'traumatic neurasthenia?' That is correct? A. Yes, sir; it might produce what he complained of largely, traumatic neurasthenia, usually produces a traumatic neurasthenia; yes." The doctor further testified: "'Trauma' means—is a blank term: the derivation of the term means nerve weakness; and it is dependent, or the fact is that it is largely dependent, on the mental state of the individual. Q. But it is a weakening of the nerve, of course; that is true? A. Weakening of the nervous energy; yes; lessening of the nervous energy."

Defendant complains because Mrs. Tams was permitted to testify that the oncoming taxicab was traveling at the rate of 40 miles an hour. Her evidence merely corroborated that of plaintiff on this point and there was no evidence to the contrary. Ordinarily a question involving the rate of speed of a motor-propelled vehicle is not a question for expert testimony. *Oakes v. Omaha & C. B. Street R. Co.*, 104 Neb. 788. Judge Cooley observed that the speed of a passing train involves no question of science and is not a question for experts, and added: "Any man possessing a knowledge of time and of distances would be competent to express an opinion upon the subject." *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99.

Counsel complains of misconduct on the part of plaintiff in that he offered to show that Mr. Borsky, the

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president of the defendant company, went to the viaduct soon after the accident to make some surface measurements, and that he took with him an attorney for an insurance company to assist him who was not an attorney employed by him in the present case. The offer was denied. The argument is that plaintiff sought by this means to convey to the jury the intelligence that the company was indemnified against loss by an insurance company. Complaint is also made in that an apparent attempt was made to convey the same intelligence to the jury in the cross-examination of Mr. Borsky. The witness was not permitted to answer. We think the court erred in its ruling.

The question is not new in this state. We held in a like case that, if the defendant was not resisting plaintiff's demand in its own behalf, but that some insurance company was defending, under the cover of defendant's name, plaintiff had a right to make that fact known to the jury. *Egner v. Curtis, Towle & Paine Co.*, 96 Neb. 18.

Plaintiff maintains that the remittitur is excessive. Under section 9154, Comp. St. 1922, this court, in a proper case, is empowered to reduce the amount of the required remittitur in whole or in part. The act provides: "That whenever the court shall direct a remittitur in any action, and the same is made, and the party for whose benefit it is made shall appeal said action, then the party remitting shall not be barred from maintaining that said remittitur should not have been required either in whole or in part."

It may be observed that the remittitur was not required by the judge who presided at the trial, but by a judge who did not see the witnesses nor have an opportunity to weigh the spoken word of evidence as it was pronounced in open court. We think there is merit in plaintiff's contention that the amount required to be remitted was excessive. From a review of the evidence we are unable to find that the verdict as returned by the jury, the trier of questions of fact, should have been re-

duced almost in half by the court's order. We think that under all the circumstances a deduction of \$2,000 would be more nearly in keeping with the facts as disclosed by the evidence. It may here be added, parenthetically, that this class of litigation is well known to be a grievous burden to litigants.

That the collision was the proximate cause of plaintiff's injuries and of the resulting nervous shock is plainly apparent. The fact that the physical injuries are permanent and that the resultant mental ailment is of a progressive type and that its evil effects will increase with the passing years is established by competent evidence of men who are learned in the medical profession. On this question two of the doctors are in perfect accord.

At the time of the accident plaintiff, then a man of 42, was in life's prime. He had never known a day's illness and for about seven years had worked continuously at the laborious occupation of a locomotive fireman. So far as the record shows his daily task was without intermission. He now approaches middle age with a body maimed and a mind clouded as a direct result of the gross negligence of the defendant company. As plaintiff's ailment progresses from stage to stage his earning capacity will more than correspondingly decrease. Before he has reached the end of man's allotted span of life for active, productive labor he may himself become a dependent while yet there remains under his roof those who are dependent upon his daily labor for their daily bread.

It is ordered that the remittitur in excess of \$2,000 be vacated and a judgment entered for plaintiff for \$7,600 as of the date of the rendition of the judgment in the district court. As herein modified the judgment is affirmed.

AFFIRMED AS MODIFIED.

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INEZ A. MOOREHEAD, APPELLEE, V. ARAH L. HUNGERFORD
ET AL., APPELLANTS.

FILED MAY 15, 1923. No. 22370.

Mortgages: FORECLOSURE: MATURITY OF DEBT. "A provision in a mortgage given to secure a promissory note stipulating for the payment of interest semiannually, and that, if the interest is not paid when the same is due, the whole of the debt and interest shall immediately become due and payable and the mortgage may be foreclosed, is permissive merely, and the entire debt will not become due unless the mortgagee elect so to declare by instituting an action on the note or to foreclose. See *Lowenstein v. Phelan*, 17 Neb. 429." *McCarthy v. Benedict*, 89 Neb. 293.

APPEAL from the district court for Sioux county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

J. E. Porter, for appellants.

Daniel F. Osgood, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN and
DAY, JJ., BUTTON, District Judge.

DEAN, J.

Plaintiff began this suit to foreclose a real estate mortgage, made by A. L. Hungerford and wife, to secure the payment of certain promissory notes and interest coupons thereto attached. Subsequently and some time before the suit was commenced the land was sold by the mortgagor to L. W. Graff, the principal defendant herein, and, as a part of the purchase price, he assumed and agreed to pay the mortgage indebtedness. The Hungerfords have no interest in this suit. Certain interest coupons, which were payable March 7, 1920, became delinquent, and the suit was commenced March 26 following. Plaintiff in the petition, on account of delinquency in payment of interest, declared the whole amount due and obtained a judgment for \$6,983. 56, that being the indebtedness represented by the notes and mortgage, with interest, the day the judgment was rendered. The defendants Graff have appealed.

When the action was tried the parties stipulated with

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respect to certain material facts, which, in addition to those hereinbefore stated, in effect are that the equity of redemption was in defendant Graff; that the deed of conveyance from the Hungerfords to Graff was recorded before this suit was begun and that Graff was then in possession of the mortgaged premises; that Graff and wife were made parties defendant for the reason that plaintiff was informed they were in possession of the land; that plaintiff had no personal knowledge of the sale of the land to Graff; that no demand for payment of interest, or of any sort, was ever made upon Graff by or in behalf of plaintiff; that Graff was never notified that the notes in suit, either for interest or principal, were ever presented to the First National Bank at Crawford for payment, where by their terms they were made payable, and that Graff had no knowledge that the interest notes were due until the summons was served. Defendants Graff offered in evidence, as a part of the stipulation, a question and answer from the deposition of plaintiff, which reads: "Q. You may state if the interest payment due March 7, 1920, has ever been paid or offered to be paid? A. The interest has never been paid, that is, the notes for interest due March 7, 1920. I received a letter from some one after the foreclosure suit was commenced offering to pay the interest if I would dismiss the suit." It was stipulated that the "some one" referred to in plaintiff's deposition was written by some person in behalf of Graff.

Just before the case was closed defendants offered to pay all interest then due under the terms of the note and the interest coupons and all court costs. The offer was refused. They now contend that the trial court should have held that plaintiff was obliged to accept the offer. Under repeated decisions of this court error cannot be predicated on the court's ruling.

The suit was originally commenced May 25, 1920, and on November 15, 1920, a demurrer to the petition having been sustained, the petition was amended by

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interlineation and refiled. The contract, or mortgage, between the original parties, *inter alia*, provides: "That a failure to pay any of said money, either principal or interest, when the same become due, or a failure to comply with any of the foregoing agreements, shall cause the whole sum of money herein secured to become due and collectable at once at the option of the mortgagee." The coupon bonds, or principal notes, which are secured by the mortgage, provide that, "upon any failure to pay any of said interest within five days after due, the holder may elect to consider the whole note due and it may be collected at once."

The notes and the mortgage, taken together, constitute a valid and enforceable contract. Defendants as purchasers having assumed and agreed to pay the mortgage indebtedness as a part of the purchase price were bound by the terms of the instruments which constitute the contract. The mortgage having been recorded, defendants were chargeable with notice of its provisions.

This form of contract, and the controversy arising thereunder, presents a question that is not new in this state. *Northwestern Mutual Life Ins. Co. v. Butler*, 57 Neb. 198, is a similar case, where we held that, in default in the payment of past-due interest, specific notice to the mortgagor before beginning a foreclosure suit was not necessary, commencement of the suit being sufficient notice of the mortgagee's election, or option, in the premises. In *National Life Ins. Co. v. Butler*, 61 Neb. 449, we held that, if the mortgagee so elect, he may "proceed at once, without notice, to enforce his security," and that "the commencement of a foreclosure suit is notice of his election, and no other notice is necessary." To substantially the same effect is *McCarthy v. Benedict*, 89 Neb. 293, and cases there cited. In the *McCarthy* case a rehearing was denied.

It is held generally that a stipulation in a mortgage, such as is involved here, does not create a penalty or a forfeiture, but is merely a permissive provision, and when

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exercised by the mortgagee it does not cause the unpaid installments of interest to mature, nor does it cause the statute of limitations to run against the mortgage debt. 27 Cyc. 1101.

Other questions have been raised by defendants in their brief which we have considered but do not find it necessary to discuss.

Finding no reversible error, the judgment of the district court is

AFFIRMED.

WILLIAM BORGMANN ET AL., APPELLANTS, V. FRED BORGMANN ET AL., APPELLEES.

FILED MAY 15, 1923. No. 22312.

1. **Deeds: CANCELANATION: MENTAL CAPACITY: BURDEN OF PROOF.** "Where it is sought to cancel a deed for the want of mental capacity of the grantor to make the instrument, the burden of proof is on the one who alleges the mental incapacity." *Brugman v. Brugman*, 93 Neb. 408.
2. ———: **EXECUTION: MENTAL CAPACITY.** "In determining the mental capacity of the grantor to execute a deed, if it clearly appears that when the instrument was executed the grantor had the capacity to understand what he was doing, knew the nature and extent of his property, and what he proposed to do with it, and to decide intelligently whether or not he desired to make the conveyance, it cannot be said that he was incompetent or incapable of executing the instrument." *Brugman v. Brugman*, 93 Neb. 408.
3. ———: **FRAUD: PROOF.** If fraud in the execution of a deed is alleged and denied, in the absence of proof showing such fraud, the deed will not be set aside.

APPEAL from the district court for Lancaster county:
FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

W. C. Frampton and D. J. Flaherty, for appellants.

H. J. Whitmore, *contra*.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

ALDRICH, J.

Suit in equity brought in the district court for Lancaster county by William Borgmann and five other children and a grandson of Christian Borgmann and

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Katherina Borgmann against Fred Borgmann to set aside a deed conveying 80 acres of land from Christian and Katherina Borgmann to Fred Borgmann. The trial court found for defendant and dismissed plaintiffs' petition. Plaintiffs appeal.

Since the filing of the appeal in this court, Minnie Busboom and Christian Borchers have filed disclaimers and asked to have the appeal dismissed as to them. The appellants here are William Borgmann, Marie Borchers and Louise Vogelsing.

The principal issue is the validity of the deed in litigation. Before discussing the propositions involved, a brief historical and biographical sketch of the principal figures in this lawsuit will be instructive and conclusive to a clear understanding of the facts.

Christian Borgmann, born in Germany, May 7, 1831, came to the United States while still a young man. He worked for a time in Missouri, then went to Iowa, where he married Katherina Taves. In 1865 he removed to Nebraska and homesteaded the northeast quarter of section 20, township 10, range 5, in Middlecreek precinct, Lancaster county. Here he and his wife reared their family. Six of their children are involved in this lawsuit: Louise, born April 3, 1859; William, born January 2, 1861; Minnie, born March 17, 1864; Herman, born February 24, 1869; Marie, born August 27, 1871, and Fred, born January 6, 1875. Christian Borchers, only son of Emma Borgmann, a deceased daughter, is also named in the pleadings.

When the sons William and Herman married in 1884 and 1893, respectively, the father gave each 80 acres of land, a team of horses and some farming equipment. The daughters at marriage received \$200 in cash or personal property.

Fred, the youngest son, and defendant in this case, lived at home after the other children had left, and he worked the farm without wages until 1898, when he was 23 years of age. At that time he married Mary Schmale

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and at the request of his parents brought his bride to the home place to live. For three years he rented the home place on shares. On December 12, 1898, the parents deeded to him the east eighty of the original homestead, but the deed was not delivered or recorded until the year 1901.

During the first year Fred and his wife lived on the place, a 14 by 18 addition was made to the house, and the first story of this was fitted up for the father and mother. The cost of the addition was paid in equal shares by Fred and his father. The father and mother took their meals with the family. Four children were born to Fred and his wife, and peace and harmony ruled in the home during all of the 21 years that elapsed from Fred's marriage to the death of his father. Neither Fred nor his wife received any compensation for the care and maintenance of his parents during all that time.

The father and mother, on February 9, 1915, executed to Fred a deed of the remaining or west eighty of the original homestead. The consideration recited was \$1 and the agreement of the grantee, Fred Borgmann, "to support and take the best of care of the said grantors, Christian and Katherina Borgmann, during their lifetime." This is the deed involved in this lawsuit.

At the time the deed was executed Christian Borgmann was almost 84 years old and Katherina Borgmann was 77. In November, 1915, nine months after the deed was executed, Katherina Borgmann died from pneumonia. Christian Borgmann lived until September 12, 1919, or 4½ years after the making of this deed. No attempt was ever made by the grantors or either of them to repudiate or set the deed aside.

In February, 1921, the plaintiffs instituted this suit to have the deed of February 9, 1915, canceled and title quieted and confirmed in the heirs of Christian Borgmann.

Were the parents improperly influenced in deeding this west eighty to Fred in 1915, or was it a simple act of

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justice and a fair recognition of his services to them? The evidence seems to answer in the negative as to improper influence and in the affirmative as to fair recognition of services. Was the kindness and affection worthy of reward and naturally reciprocated? No presumption of fraud arises from the relationship of parent and child. On this proposition see *Winslow v. Winslow*, 89 Neb. 189; *Ward v. Ward*, 86 Neb. 744; *Gibson v. Hammang*, 63 Neb. 349.

Another question raised is: Did Christian Borgmann have the mental capacity necessary to perform this transaction at the time he did in 1915? It is our opinion that he was as competent as any man of his age. Several witnesses who had known him for years and who had no interest in the outcome of the case testified that he was of sound mind at the time the deed was executed and was capable of attending to all his own business. He worked up almost to the last year of his life and was very active for his age. Witnesses testified that they never heard his mental capacity questioned until this suit was commenced. Dr. Hohlen, the family physician, gave strong and positive testimony that the grantor was mentally competent in 1915, and afterwards up to his death. This witness spoke of a slight shaking the grantor had in his hands, but explained that it accompanied old age and in this case did not in the least affect his mentality.

Mr. Hagensick, the notary public, who acknowledged the deed, testified that both the grantor and his wife were competent to attend to this business and apparently knew exactly what they were doing and what they wanted done.

On the question of fraud appellants contend that the grantor was made to believe he was giving Fred an option to buy the place. Their evidence at the trial was to the effect that the grantor thought he was giving Fred a right to build a barn on the place and be the preferred buyer. Such we do not believe was the case. Witnesses for plaintiffs testified that he made some such state-

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ments. This was about a year after the death of Katharina Borgmann. The grantor was being harassed and annoyed by William and his daughters.

The notary public, Mr. Hagensick, took particular pains to read and explain the deed to the old people in German as well as English. Nothing was said at the time about an option. The grantor knew he was executing a deed.

The evidence shows that Christian Borgmann, a man of great age and feeble health, had the good sensible discretion to divide his property as he wanted it done, because he remembered it all, the amount each had received and the value thereof.

The judgment is

AFFIRMED.

Morrissey, C. J., dissents.

C. D. COE, GUARDIAN, APPELLEE, v. NEBRASKA BUILDING
& INVESTMENT COMPANY, APPELLANT: F. B. BAYLOR,
TRUSTEE, INTERVENER.

May 15, 1923. No. 22372.

1. **Parties.** A person with whom or in whose name a contract is made for the benefit of another may bring an action without joining with him the person for whose benefit it is prosecuted. Comp. St. 1922, sec. 8528.
2. **Insane Persons: CONVEYANCES: RATIFICATION.** "Neither the county court, nor a person under guardianship because of insanity, nor the guardian of the latter, nor all together, can ratify or confirm a conveyance of lands by the ward made previous to the guardianship but while he was insane." *Gingrich v. Rogers*, 69 Neb. 527.
3. **Guardian and Ward: SALE OF PERSONALTY.** In Nebraska, the guardian may not sell personal property of a ward except under order of the court and after due and proper notice. Comp. St. 1922, sec. 1603.
4. **Contracts: AVOIDANCE: MENTAL CAPACITY.** Imbecility or weakness of mind to such a degree as to render one incapable of understanding and protecting his own interests will avoid his contracts or conveyances.

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5. **Evidence** examined, and *held* sufficient to sustain the verdict of the jury.

APPEAL from the district court for Lancaster county:
WILLIAM M. MORNING, JUDGE. *Affirmed.*

Doyle, Halligan & Doyle and *Good & Good*, for appellant.

C. M. Skiles, for appellee.

F. B. Baylor and *Johnson, Moorhead & Rinc*, for Baylor, Trustee.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

ALDRICH, J.

Action at law brought by C. D. Coe as guardian of the estate of Fannie E. Griggs, insane, against the Nebraska Building & Investment Company to recover \$44,245, for stock purchased by Fannie E. Griggs in the defendant company. Plaintiff's amended petition, filed February 16, 1921, alleged, among other things, that Fannie E. Griggs was adjudged insane August 10, 1920, and committed to the state hospital for insane at Lincoln on that date; alleged the appointment on September 4, 1920, of C. D. Coe and his qualification as her guardian; alleged further, in substance, that through fraudulent representations of defendant's agents and salesmen she, being insane at the time, was induced to purchase 411 shares of 7 per cent. preferred stock in the defendant company at \$100 a share, part purchased in March, 1917, part in September, 1918, with the agreement of the company that the money paid could be withdrawn within one year and 30 days; that because of fraud practiced upon her by the defendant company, its agents and officers, and because she was mentally incompetent at the times of the transactions, and because of the promises of defendant, its manager and president and other agents to return the money paid by her, the defendant company was liable in the sum of \$44,245, for which judgment was prayed.

Defendant attacked the petition by motions, demurrers, and plea in abatement, all of which were overruled by the trial court. Issues were framed by plaintiff's petition, the defendant's answer, and plaintiff's reply on the question of the insanity of Fannie E. Griggs and of fraud practiced by defendant. The case was tried to a jury resulting in a verdict in plaintiff's favor for the sum of \$43,410.72. Judgment was entered accordingly and defendant, Nebraska Building & Investment Company, appeals. The action was dismissed as to the other defendants, officers and agents of the company.

In Nebraska, the guardian may not sell personal property except under order of court and after due notice. In support of this, see *Hendrix v. Richards*, 57 Neb. 794.

Was the ward, Fannie E. Griggs, of sound mind and could she rescind, ratify or make a valid contract at the times she did, and how has this proposition been considered by our court? The answer to this proposition is decisive of the case.

In 14 R. C. L. 587, sec. 42, it is said: "It is well settled that the party who is sane is estopped to set up the objection that the other party is insane for the purpose of avoiding the contract. The right to avoid is for the protection of the insane person, and those who deal with him have no corresponding right." This proposition is in *Lincoln v. Buckmaster*, 32 Vt. 652; *Lindsey v. Lindsey*, 50 Ill. 79, 99 Am. Dec. 489, and note; *Hill v. Nash*, 41 Me. 585, 66 Am. Dec. 266, and note; *Jackson v. King*, 4 Cow. (N. Y.) 207, 15 Am. Dec. 354, and note.

The evidence as to Fannie E. Griggs' insanity at the time of these transactions is overwhelming and was known and acted upon to some extent by defendant company's agents and salesmen. At least they took advantage of her condition and ignorance in transacting business.

The jury, under ample and abundant evidence on insanity and fraud, found the verdict for plaintiff and

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there is no error on the part of the trial court that is sufficient or material in any way to reverse that finding. Fraud and misrepresentation having been passed upon by the jury when the same was duly submitted to them, and their investigation in that regard having been thorough, and justice having been done in all respects, this verdict as found by the jury is for affirmance.

AFFIRMED.

SHERMAN A. LOWE V. STATE OF NEBRASKA.

FILED MAY 15, 1923. No. 23200.

1. **Criminal Law:** CIRCUMSTANTIAL EVIDENCE. "To justify conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together or as a whole, must be of such a character as to be consistent with each other, and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence." *Smith v. State*, 61 Neb. 296.
2. **Evidence** examined, and *held* insufficient to sustain the verdict.

ERROR to the district court for Furnas county: CHARLES E. ELDRED, JUDGE. *Reversed.*

Butler & James and Edward J. Lambe, for plaintiff in error.

O. S. Spillman, Attorney General, and *George W. Ayres*, *contra*.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

ALDRICH, J.

The plaintiff in error (hereinafter termed defendant) was prosecuted in the district court for Furnas county, upon an information charging him with murder in the first degree of one D. N. Campbell. The jury found him guilty of manslaughter. Motion for new trial was overruled and a sentence of three years' imprisonment in the penitentiary was imposed by the court. Defendant

now presents the record of his conviction to this court for review.

The principal assignments of error are as follows: Insufficiency of evidence; verdict is contrary to evidence; evidence does not connect defendant with the crime with which he is charged. This in short presents the propositions upon which defendant relies for reversal.

The record discloses that on September 6, 1922, the deceased, D. N. Campbell, was employed by the J. J. Grier Company as cook of a boarding train camp conducted for the railroad trackmen engaged in work at Edison, Nebraska. Defendant was employed as a waiter. The train camp, consisting of a number of box cars, was located on a side-track. Defendant's dining car was located next to the kitchen car where the deceased was found dying at 1:30 p. m. The kitchen and dining cars had swinging doors at each end and were connected by board planks laid between the cars.

There is no direct evidence that defendant stabbed the deceased, but, so far as the record shows, he was the last man to see Campbell before he was found stabbed. The witness Miller, a waiter, testified that he had been in the kitchen car a few minutes after 1 o'clock; that defendant was there at the time wanting to help Campbell with his work; that about five minutes after the witness left the car defendant called to him and said, "The cook is dead." When Miller came to the door Campbell was still alive, but before the commissary clerk arrived from town he was dead.

These three witnesses, Miller, the commissary clerk, and the defendant, testified as to what took place in the kitchen car about the time the deceased was said to have been killed. In all essential particulars their testimony presents no discrepancy.

An ordinary paring knife was found on a table in the kitchen car by Edwards, the commissary clerk, and was received in evidence. There was no blood on the knife

and nothing to show it had been used by defendant for any other purpose than peeling potatoes.

Another circumstance in defendant's favor is the absence of evidence of provocation or intent to commit the crime. It is true their language was coarse, rough and uncouth. But, as a matter of law: "Mere words, however abusive and insulting, will not justify an assault, nor constitute a sufficient provocation to reduce to manslaughter what would otherwise be murder." *State of Kansas v. Buffington*, 71 Kan. 804, 4 L. R. A. n. s. 154. See, also, *Braunie v. State*, 105 Neb. 355.

From the bill of exceptions we quote the following testimony of Dr. Fast: "I found this man was suffering with a disease known as paresis, or pares; the common term is softening of the brain; another familiar term that people might understand better is general paralysis of the brain. * * * Q. Now, what would you say, doctor, about the patient having the disease in the stage you found Mr. Lowe to be in, with reference to being able to control the muscles of the body, especially in times of excitement? A. There would be times when he would not be able to control his muscular act. Q. And at other times, what would you say as to his being mentally competent? A. At other times he would be normal. Q. Do you know anything, doctor, about the term of 'gooseing'? A. Yes. Q. And what would you say as to the effect this 'gooseing' would have on the patient in the condition you found Mr. Lowe to be in as to his being able to control the muscles, and his actions? A. A man that is subjected to anything that will produce an irritability of the nervous system, continuously, even pointing the finger at him, or any one with a shrill sharp noise, that might be irritable to his system."

Our court has said: "Where it is sought to establish homicide by circumstantial evidence, the circumstances, when taken together, should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral

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certainty that the accused, and no one else, committed the offense charged." *Casey v. State*, 20 Neb. 138.

It may be true that the state failed to prove facts that show at least a probability, yet it also failed to prove beyond a reasonable doubt the fact that the defendant, and defendant alone, could have been the only one who could have committed this crime. It is a matter of law in this state that: "It is essential that the circumstances, taken as a whole, and giving them their reasonable and just weight, and no more, should to a moral certainty exclude every other hypothesis. *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 319." *Casey v. State*, *supra*.

Where the state for conviction relies on circumstantial evidence, circumstances and material facts should point to the guilt of the defendant.

The defendant testified: "Dan (deceased) was on the bed and I went to the ice box and I raised up the lid to get those potatoes; they were in a steamer, and I pulled the potatoes out and set them on the bread box directly to the left, and, as I raised it, something on the range attracted his attention, and I was there ready to let the door down when he immediately got up and 'goosed' me, and, as he did so, in order to get away from him, I dropped the ice box lid and turned around and came in contact with him, and as he always followed me up in his playful way, to try to get me again, and I had three broken ribs at that time, I ran directly clean on out into the other car; clear in the east of the car, the kitchen, and I did not stay; I went on into my dinner, and I was kind of nervous, and I stopped and went to the door and stood there, and I think it was Tony Tracy came along and talked to him a minute, and took a drink of water, and while standing there in the door talking I heard a fall back in the kitchen car, I immediately stepped over to where I could see into the kitchen, and I saw that Dan was on the floor, and I made a run for him, and got there just as quick as I could, and when I

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came there I saw he had been wounded, and I immediately got some water, but he could not drink. I went out and called Adam Miller to come and go and get Mr. Edwards at once, which he did; and I remained right there, and I tried to revive him, and pulled off my apron and put over him, and I did all I could, and to no avail, He lived possibly ten minutes."

The conclusion is that the verdict is not sustained by the evidence. It follows that the judgment must be, and it hereby is, reversed, and the cause is remanded.

REVERSED.

JOHYN TRAGAS, APPELLEE, v. CUDAHY PACKING COMPANY,
APPELLANT.

FILED MAY 15, 1923. NO. 23256.

1. **Master and Servant: WORKMEN'S COMPENSATION: REVIEW.** "A finding of the district court on an issue of fact in a compensation case will not be set aside on appeal, where it is supported by sufficient evidence, or where the evidence is substantially conflicting, unless the finding is clearly wrong." *Simon v. Cathroe Co.*, 106 Neb. 535.
2. **Evidence** examined, and *held* sufficient to sustain the findings and judgment of the trial court.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Sears, Horan & Sears, for appellant.

Wayne E. Sawtell, *contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and
GOOD, JJ., BEGLEY, District Judge.

ALDRICH, J.

This is a proceeding under the workmen's compensation law. The case was originally brought before the compensation commissioner by plaintiff, an employee of defendant, the Cudahy Packing Company. From the commissioner's award of compensation defendant appealed to the district court for Douglas county.

Plaintiff in his petition alleged, in substance, that on

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or about October 26, 1921, and for a long time prior thereto, he was employed by defendant as a "handy man;" that among other things plaintiff racked meat and washed rennets and racks; that to properly clean the rennets and racks it was necessary to use not only a steel brush but some sharp-edged instrument; that he used a chisel for this purpose; that on or about October 26, 1921, he sustained an injury to his right hand while grinding the chisel on one of defendant's grindstones which was not equipped with the safety guard as provided by law; that his right hand was so mutilated that it became necessary to amputate the first and second joints of the fourth or little finger, and the third finger; that the second and first fingers were so injured as to render them permanently useless. Plaintiff further alleged he was earning at the time \$21.60 a week, and was entitled to the sum of \$14.40 a week for 100 weeks, and prayed for compensation in that amount.

Defendant's defense was that the injury did not arise out of and in course of plaintiff's employment, and that the injury was due to plaintiff's own wilful negligence.

Upon issues being joined by plaintiff's reply, the cause was tried to the court without a jury, and resulted in a finding in plaintiff's favor and in an award of compensation to plaintiff at the rate of \$14.40 a week for 100 weeks, also awarding an attorney's fee and hospital expense. Defendant appeals.

Appellant contends the verdict is not in accordance with the evidence and is contrary to law. In perusing the record we are prone to say that there is ample evidence and abundant law to sustain this judgment. The facts portrayed truth and it is not our duty to disprove the same. It has been repeatedly held that findings of fact by the trial court in this class of cases, when supported by sufficient competent evidence, will not be set aside unless clearly wrong. We held that in *Simon v. Cathroe Co.*, 106 Neb. 535, and such is the law in Nebraska today.

Perry v. Huffman Automobile Co., 104 Neb. 211, is also instructive in deciding this case. It might be well to observe that the employer's liability act is construed liberally and is intended to avoid formal and technical court procedure.

In the case at bar the law fixes the amount paid weekly and the number of weeks for total loss. This is just and fair, and when the plaintiff receives this amount he receives under this law all he is entitled to, in our judgment.

In the case of *Radtke Bros. & Korsch Co. v. Rutzinski*, 174 Wis. 212, it is held: "In proceedings under the workmen's compensation act, the crucial question is whether at the time of the accident the employee was performing services growing out of and incidental to his employment; and a defendant may be held liable for compensation although he has used the utmost care, and a claimant may recover although he has been guilty of contributory negligence."

As a matter of fact, at the time of his injury plaintiff was engaged in sharpening a chisel for the purpose of cleaning some pans. This work was done during the noon hour and was, as a matter of fact, done on his own time, but was clearly incidental to his employment. For a complete discussion analogous to this, see *Farmers Grain & Supply Co. v. Blanchard*, 104 Neb. 637.

Thus it is plain that this injury occurred while plaintiff was under the employment of the defendant, and he was entitled to the benefit of the law growing out of compensation, and was not guilty of contributory negligence. This case in many respects is not unlike *State v. District Court*, 129 Minn. 176.

At the risk of repetition, we cite *American Smelting & Refining Co. v. Cassil*, 104 Neb. 706, for the purpose of emphasizing the position of this court, and from which we refuse to depart. We believe that this position so clearly does justice to the plaintiff that we will base

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the decision on it. This being our position, we are for the affirmance of this case.

In the matter of allowance of attorney's fees we are of the opinion that services of counsel for plaintiff should be settled by defendant paying into court the sum of \$100.

The judgment is

AFFIRMED.

EARL F. SALLANDER, APPELLEE, V. PRAIRIE LIFE
INSURANCE COMPANY, APPELLANT.

FILED MAY 15, 1923. No. 22309.

1. **Evidence:** PRODUCTION OF DOCUMENTS. When a party to an action has secured an order of court to produce a book, paper or document in the possession or control of the adverse party, as provided by section 8901, Comp. St. 1922, and the adverse party refuses to comply with such order, the proper practice is for the party desiring to use the book, paper or document in evidence to offer an affidavit setting forth the contents of such book, paper or document. It then becomes the duty of the court to instruct the jury to presume that the contents of the book, paper or document is such as the affidavit alleges it to be.
2. **Evidence** examined, and *held* not sufficient to sustain the verdict.

APPEAL from the district court for Douglas county:
CARROLL O. STAUFFER, JUDGE. *Reversed.*

Blackburn & King, for appellant.

McKenzie, Burton & Harris, *contra*.

Heard before MORRISSEY, C. J., LETTON, DEAN and
DAY, JJ., BUTTON, District Judge.

DAY, J.

This action was brought by plaintiff to recover \$4,319.32 alleged to be due from the defendant for services performed under two oral contracts. The trial resulted in a verdict for the plaintiff for \$3,297.12, with interest from January 1, 1920, upon which judgment was entered. Defendant appeals.

Plaintiff alleges in his amended petition, and the

amendment thereto, in substance, that on November 29, 1916, the parties to this action entered into a written contract whereby the plaintiff agreed to become the agent of the defendant to solicit life insurance upon a commission basis; that a few days thereafter a question arose as to the meaning of certain parts of the contract, whereupon the plaintiff and the defendant entered into an oral contract, by the terms of which, in addition to the provisions of the written contract, the plaintiff was to receive commissions on renewals and overwritings on policies theretofore procured by him; that there was due and owing to the plaintiff as commissions on renewal premiums more than \$1,500, and on overwritings more than \$1,000. It was also alleged that between December 15, 1918, and January 15, 1919, a second oral contract was entered into between the parties, by the terms of which the plaintiff was to receive an additional salary of \$100 a month and expenses for the year 1919; that there was due and unpaid upon this second oral contract \$1,200 as salary and \$619.32 expenses.

The defendant denied that the alleged oral contracts were made; denied that it was indebted to the plaintiff in any sum whatever; averred that the only contract existing between the parties was the written contract of November 29, 1916; and further alleged that any item of commissions, renewals or overwritings alleged to be due prior to May 1, 1916, is barred by the statute of limitations. With respect to this second oral contract the defendant denied that the contract was ever made, and averred that the alleged oral agreement was by its terms not to be performed within one year, and was void under the statute of frauds.

It is first urged by the defendant that the evidence was not sufficient to warrant the court in submitting to the jury the question whether there was an oral contract between the parties relating to the payment of commissions on renewals and overwritings. The testimony upon this issue is so interwoven with the testimony as to the

meaning of the written contract that it is difficult to understand. The cross-examination of the plaintiff was long and technical, and many of his answers were somewhat inconsistent with his theory that a new and independent oral contract had been made a few days after the written contract of November 29, 1916. After a careful examination of the testimony, we have concluded that the evidence was sufficient to submit this issue to the jury.

It is also urged that the plaintiff's testimony bearing upon the alleged second oral contract showed that the contract, if entered into at all, was made in December, 1918; that it was not to be performed within a year, and hence was void under the statute of frauds. Here again there is confusion in the testimony. The plaintiff first testified that this second oral contract was made in December, 1918. Later he was again called to the stand, and made it clear that he desired his testimony to be understood as fixing the date of the second oral contract in January, 1919. The court instructed the jury upon this phase of the case that, if they believed from the testimony that the contract was made in December, 1918, the plaintiff could not recover upon the second oral contract. We think under the circumstances this issue was properly submitted to the jury.

The defendant next contends that the court erred in permitting the affidavit of the plaintiff to be introduced in evidence as proof of the amount of commissions owing to him on renewals and overwritings. This affidavit was offered by the plaintiff, and received in evidence by the court upon the theory that it was competent under section 8901, Comp. St. 1922. This section of the statute provides, in substance, that either party to an action may demand in writing of the adverse party an inspection of any book, paper or document in his possession or under his control containing evidence relating to the merits of the controversy; that, if compliance with the request is not made within four days, the court or

judge upon notice may in their discretion order the adverse party to give the other within a specified time an inspection of the book, paper or document desired, and on failure to comply with such order the court may exclude the book, paper or document from being used in evidence, or, if wanted in evidence by the party applying for it, may direct the jury to presume it to be such as the party by affidavit alleges it to be.

It appears that a proper demand was made by the plaintiff for an inspection of certain books and records of the defendant showing the renewals and overwritings of policies procured by the plaintiff or his agents. This demand not having been complied with, the court made an order commanding the defendant to produce in court at 9 a. m. on September 2, 1920, certain of the books and records of the defendant for inspection by the plaintiff. Apparently this order was not complied with, as it appears that on September 4, 1920, the defendant filed certain objections to the production of its records. No ruling appears to have been made upon the objections. Afterwards the plaintiff filed an amended petition, and secured a second order from the court requiring the defendant to produce for plaintiff's inspection certain designated books and records. In this order no time was designated within which the books should be produced. Apparently this order was not complied with. Later, on December 20, 1920, the plaintiff filed an amendment to his amended petition, and secured from the court a third order requiring the defendant to produce its books and records for the plaintiff's inspection. This order also failed to state within what time the books should be produced. It appears that the plaintiff was accorded the privilege of making only a partial examination of the books. Upon the trial the plaintiff offered in evidence, and the court received, plaintiff's affidavit setting forth in general terms the contents of the books and records demanded with reference to renewals and overwritings. Defendant's main objection to the in-

roduction of the affidavit in evidence is that no proper preliminary order for the production of the books and records was made by the court. The point is stressed that the order of the court did not state the time within which the books and records should be produced. This is true of the second and third orders. The first order of the court specifically stated a time. So far as the record shows, the first order was never set aside or modified. In this state of the record we are of the view that the court did not abuse its discretion in issuing the orders for the inspection of the books and records, and further that a sufficient preliminary order was made to permit the affidavit to be used in evidence.

Defendant also urges that the evidence is not sufficient to sustain the verdict. The only evidence bearing upon the amount which the plaintiff claimed for renewals and overwritings was the affidavit above referred to. This affidavit recited in substance that defendant's books would show that from November 1, 1913, to May 10, 1920, the plaintiff and his agents wrote 927 policies in defendant company; that 463 of said policies have been renewed; that the total aggregate of renewal premiums paid to the defendant was \$18,901.45, upon which plaintiff was entitled to a commission of 5 per cent., amounting to \$2,703.05 (this is a manifest error); that there was paid to the plaintiff on said account \$1,203.05, leaving a balance due thereon of \$1,500; that the amount of overwritings due the plaintiff was \$716.70; that the last payment on account of commissions, renewals and overwritings was made in December, 1919.

Upon the issue presented under the second oral contract the plaintiff testified that there was due him \$1,200 for salary, and \$619.32 for expenses, making a total of \$1,819.32. It will be observed that the plaintiff's testimony shows his claim to be made up of items as follows:

On first oral contract for renewals.....	\$1,500.00
On first oral contract for overwritings....	716.70

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On second oral contract salary and expenses 1,819.32

Total.....\$4,036.02

At the defendant's request the court instructed the jury that in no event could the plaintiff recover any commissions shown to be due and unpaid more than four years prior to the institution of the present action, which was on May 15, 1920. Whether this instruction was proper in view of the alleged payment on the account it is not necessary to determine, as plaintiff makes no objection to the instruction. The affidavit of plaintiff shows that the renewals and overwritings were earned between November 1, 1913, and May 10, 1920, a period of something over six years. No date is given showing when any particular part of the renewals and overwritings were earned by the plaintiff. The aggregate of the renewals and overwritings, according to the affidavits, is \$2,216.70. Under the court's instruction the jury were not permitted to allow any commissions earned prior to four years before the commencement of this action. It is plain that the jury had no data before it from which it could determine what part of the total sum was earned within the four-year period. Confronted with this situation it is quite apparent from the verdict rendered that the jury undertook to apportion the total amount earned during the six-year period by allowing 2/3 thereof for the four-year period, as is shown by the following summary:

2/3 of \$1,500 claimed on renewals.....\$1,000.00

2/3 of \$716.70, overwritings 477.80

Salary of \$100 a month for one year, and

expenses of \$619.32 1,819.32

Total.....\$3,297.12

This is the exact amount of the jury's verdict. Under this state of facts we think it is clear that there was not sufficient evidence to sustain the verdict. It cannot be

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presumed that the commissions earned within the four-year period amounted to $\frac{2}{3}$ of the entire amount for a period of six years.

Other objections have been urged by the defendant, which have been considered, but which seem to us unnecessary to determine.

It follows from what has been said that the judgment should be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

ROSY KUNES ET AL., APPELLEES, V. SOVEREIGN CAMP,
WOODMEN OF THE WORLD, APPELLANT.

FILED MAY 15, 1923. No. 22367.

1. **Insurance:** AGENCY. "Where the by-laws of a fraternal beneficiary association authorize the clerk of a local camp to collect arrearages from members who have been suspended for nonpayment of assessments, to restore their names to the membership list, and to report reinstatements to the sovereign camp, he is the agent of the association in performing those duties." *Henton v. Sovereign Camp, W. O. W.*, 87 Neb. 552.
2. ———: REINSTATEMENT: ESTOPPEL. "A fraternal beneficiary association may be bound by the action of a local camp clerk who collects arrearages from a member suspended for nonpayment of assessments and restores his name to the membership list without demanding or receiving a health certificate required by the by-laws, where the clerk acts with full knowledge that the member is sick at the time, and where there is no fraud on the latter's part." *Henton v. Sovereign Camp, W. O. W.*, 87 Neb. 552.
3. ———: BY-LAWS; INCREASE IN ASSESSMENTS. Where a regularly enacted by-law of a fraternal beneficiary association provides for the payment of an increased rate of assessments by its members after January 1, 1920, and further provides that members who had become such before that date by continuing to pay at the prior rate thereby elected to annul the provision in the certificate calling for the payment by the association of \$100 for a monument, *held*, such by-law is reasonable; that a member by continuing to pay at the old rate thereby forfeited his right to monument benefits.

APPEAL from the district court for Colfax county:

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FREDERICK W. BUTTON, JUDGE. *Remanded, with directions.*

De E. Bradshaw and George W. Wertz, for appellant.

W. C. Hronek and W. I. Allen, contra.

Heard before MORRISSEY, C. J., ALDRICH, DAY and GOOD, JJ.

DAY, J.

This is an action on a fraternal beneficiary certificate to recover \$1,000 for life insurance, and an additional sum of \$100 for a monument. The certificate was issued by the defendant, a fraternal beneficiary association, on October 3, 1903, to Jendrich Studnica, who died May 6, 1920. The plaintiffs are children of the insured, and are the beneficiaries named in the certificate. The defendant denied liability on the ground that the certificate was forfeited by the failure of the insured to pay the assessments as provided in the by-laws of the association, which it is alleged were a part of the insurance contract. With respect to the provisions of the certificate relating to the payment of \$100 for a monument, it was specially pleaded that the insured had consented to an annulment of that part of the contract by paying assessments at the old rate, as provided might be done by the provisions of certain by-laws enacted by the sovereign camp of the association in 1919. The reply pleaded a waiver of the forfeiture, and also a general denial. A jury was waived, and trial was had to the court, resulting in a judgment in favor of the plaintiffs. As originally entered the judgment was for \$1,000 with interest from May 6, 1920, and the additional sum of \$100 for a monument, as provided in the certificate, making a total of \$1,183. On considering the defendant's motion for a new trial, the court became convinced that under the by-laws of the association, and the facts presented, the insurance should be scaled down, and the judgment was reduced to \$155. The judgment as

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finally entered was for \$1,028. From this judgment defendant appeals.

It appears that the defendant is a fraternal beneficiary association, which, in addition to other features, provides insurance for its members. A part of its general plan is carried on through local or subordinate camps. The insured was a member of one of these subordinate camps, known as "Zapadni Dub Camp No. 17," located at Dodge, Nebraska. To retain his membership and keep his insurance, the by-laws of the association, which were a part of his agreement, obligated him to pay certain monthly assessments. The by-laws provided that the assessments for each month were payable on or before the first day of the following month, and that if a member failed to pay his assessments within that time he should stand suspended, and during such suspension all rights under his certificate were void. The by-laws also provided that a suspended member might be reinstated on certain conditions, among them the payment of all assessments in arrears, and the furnishing of a certificate of good health.

It appears that at the biennial session of the sovereign camp of defendant association, held in July, 1919, certain by-laws were enacted and others amended, which became effective December 31, 1919. The effect of these new by-laws was to raise the assessments upon all members commencing January 1, 1920.

Under these new by-laws members who became such prior to January 1, 1920, had the option of continuing to pay assessments at the old rate. These by-laws provided in substance that, if a member continued to pay at the old rate, he thereby elected to have the amount of insurance named in his certificate reduced as provided in a table attached to the by-laws. This reduction as applied to the facts in the case at bar amounted to \$155. The adoption of the higher rate of assessment, which no doubt was necessary, proved to be very unpopular. When the new rate became effective the insured, together with

22 other members of the Zapadni Dub Camp, refused to pay the assessments at either the old rate or the new rate, and were suspended. The insured was suspended February 3, 1920. The clerk of the local camp, acting under the direction of the sovereign camp, made special efforts to induce the suspended members to pay their assessments and be reinstated. He called upon the insured and also talked with insured's son (not the beneficiary in the certificate) and induced him to pay up his father's assessments. On March 30, 1920, the son paid the assessments for the months of January, February, and March, and also arranged with the clerk for the payment of subsequent assessments, and the insured was reinstated. The clerk promptly remitted the amount of the assessments for the months of January, February, and March to the sovereign camp, as having been paid by the insured. The defendant accepted the assessments and retained the same, together with two subsequent assessments, until the date of the trial in July, 1921, when it was tendered back. At the time the payment was made and the insured reinstated no health certificate was demanded by the clerk of the local camp. He testified that he had never had any health certificate blanks; that he knew the condition of the insured's health; knew that he had undergone an operation for the removal of his tonsils, but regarded him as in fairly good health. It is not claimed that the insured or his son who paid the assessments perpetrated any fraud upon the clerk of the local camp or the defendant in procuring the insured's reinstatement.

Under the plan of organization of the defendant association it collected the assessments through the clerks of the several local camps. That the clerk of the local camp was the agent of the defendant in doing what he did cannot be doubted under the decisions of this court. *Henton v. Sovereign Camp, W. O. W.*, 87 Neb. 552.

It is clear that the provisions of the by-laws respecting the conditions upon which a suspended member might be

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reinstated are for the benefit of the association and may be waived by it. From the reports of the clerk of the local camp the defendant knew that the insured had been suspended. It also knew when the remittances were made in payment of the assessments for January, February, and March, that the clerk was reinstating the insured, as otherwise there would be no purpose of remitting the money for these months. By being charged with the knowledge of its agent, the defendant knew that no certificate of good health had been furnished by the insured. Under these circumstances we think the defendant cannot now claim that the certificate was forfeited for the nonpayment of the assessments, or that the insured was improperly reinstated.

Under the facts before us we think the case falls within the rules announced in *Modern Woodmen of America, v. Colman*, 68 Neb. 660, *Pringle v. Modern Woodmen of America*, 76 Neb. 388, and *Henton v. Sovereign Camp, W. O. W.*, 87 Neb. 552. In the *Henton* case it was held: "Where the by-laws of a fraternal beneficiary association authorize the clerk of a local camp to collect arrearages from members who have been suspended for nonpayment of assessments, to restore their names to the membership list, and to report reinstatements to the sovereign camp, he is the agent of the association in performing those duties." And, further: "A fraternal beneficiary association may be bound by the action of a local camp clerk who collects arrearages from a member suspended for nonpayment of assessments and restores his name to the membership list without demanding or receiving a health certificate required by the by-laws, where the clerk acts with full knowledge that the member is sick at the time, and where there is no fraud on the latter's part."

It is urged by the defendant that the court erred in rendering a judgment requiring the defendant to pay \$100 toward a monument to be erected over the grave of the insured. At the biennial session of the sovereign

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camp held in July, 1919, as above stated, a by-law was also enacted which provided in substance that a member who continued to pay at the old rate after January 1, 1920, thereby consented to the annulment of that part of the certificate relating to monument benefits. At the time the insured became a member of the association he agreed, among other things, to be bound by such by-laws as then existed or which might thereafter be enacted. Under the circumstances disclosed by the record it seems that the by-laws enacted at the biennial session of 1919 relating to the scaling down of the amount to be paid upon certificates, and also the annulment of monument benefits, are reasonable, and that the insured was bound thereby. We think, therefore, that the court erred in rendering judgment for \$100 for the erection of a monument.

It is next urged by the defendant that neither the insured nor the beneficiaries paid the assessments. We see no merit in this contention. Assuming that the payment was made without the knowledge of the insured or the beneficiaries, still it could be ratified by them. The fact that the beneficiaries are here insisting upon the payment of this certificate is a sufficient ratification of the act of their brother in paying the assessments.

From what has been said it follows that the court erred in including in the judgment \$100 for a monument, but in all other respects the judgment is fully sustained. We think a new trial is entirely unnecessary, but the cause is remanded, with directions to enter judgment in conformity with the views herein expressed.

REMANDED, WITH DIRECTIONS.

WILLIAM WHETSTONE, APPELLANT, V. JOHN SLONAKER ET AL., APPELLEES.

FILED MAY 15, 1923. No. 22303.

1. **Criminal Law:** PROHIBITED LEGISLATION. Section 2, ch. 195, Laws 1905 (Comp. St. 1922, sec. 1194), in so far as it attempts to confer jurisdiction upon the county court to impose both a fine of \$500 and

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imprisonment in the county jail for six months, is unconstitutional and void.

2. **Constitutional Law: PROHIBITED LEGISLATION.** An act of the legislature that is forbidden by the Constitution at the time of its passage is absolutely null and void, and is not validated by a subsequent amendment to the Constitution authorizing it to pass such an act.

APPEAL from the district court for Brown county:
ROBERT R. DICKSON, JUDGE. *Reversed, with directions.*

J. J. Harrington, for appellant.

Clarence A. Davis, Attorney General, *John M. Cotton*
and *D. R. Mounts*, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN.
ALDRICH, DAY and GOOD, JJ.

GOOD, J.

This is a proceeding commenced in the district court for Brown county by William Whetstone, petitioner, for a writ of habeas corpus. Petitioner alleges that he is unlawfully deprived of his liberty by the sheriff of said county and prays for his release. The sheriff admits the imprisonment and attempts to justify it. In his return he shows that in a prosecution before the county judge of said county, sitting as a juvenile court, petitioner was charged with the offense of contributing to the delinquency of a child. Petitioner was convicted as charged, and the county judge sentenced him to pay a fine of \$500 and to serve six months in the county jail. It was from imprisonment under this sentence that petitioner applied for the writ of habeas corpus. The district court denied the writ, and petitioner has appealed.

Petitioner was prosecuted under section 1193, Comp. St. 1922, which was enacted as section 1, ch. 195, Laws 1905. Said section provides, for its violation, a penalty of a fine not exceeding \$500 or imprisonment in the county jail for a period of not exceeding six months, or both such fine and imprisonment. Section 2 of said chapter 195 (Comp. St. 1922, sec. 1194) provides in part as follows: "The district and county courts in the

several counties shall have concurrent jurisdiction over all cases coming within the provisions of this article." If said section 1194 is valid, the county court was vested with jurisdiction to hear and determine the case and impose the penalty.

1. When said chapter 195 was enacted, the Constitution of 1875 contained a provision that county courts shall not have jurisdiction in criminal cases in which the punishment may exceed six months' imprisonment or a fine of over \$500. We think it is too clear to admit of argument that the jurisdiction, attempted to be conferred by section 1194, Comp. St. 1922, being section 2, ch. 195, Laws 1905, is greater than was authorized by the Constitution. The power of the legislature was circumscribed by this constitutional provision. It was powerless to confer the jurisdiction which it attempted.

It is held in *Finders v. Bodle*, 58 Neb. 57, that an act of the legislature, passed in violation of the Constitution, is void from the date of its enactment, and that "An unconstitutional statute creates no new rights and abrogates no old ones. It is for all purposes as though it had never been passed."

It is held by the United States supreme court in *Norton v. Shelby County*, 118 U. S. 425, 442: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

Cooley in his work on Constitutional Limitations (7th ed.) at page 259, lays down the rule thus: "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void *in toto* is true also as to any part of an act which is found to be unconstitutional, and

which, consequently, is to be regarded as having never, at any time, been possessed of any legal force."

It follows that said section 2, ch. 195, Laws 1905 (Comp. St. 1922, sec. 1194), in so far as it attempts to confer jurisdiction upon the county court to impose both a fine of \$500 and imprisonment in the county jail for six months, is unconstitutional and void.

2. On September 21, 1920, the Constitution of the state was amended so that it now provides that county courts shall not have jurisdiction in criminal cases in which the punishment may exceed six months' imprisonment or a fine of over \$500, or both. Const., art. V, sec. 16. Had chapter 195, Laws 1905, been enacted subsequent to the amendment to the Constitution, it would not be violative thereof. It is argued that the amendment to the Constitution has the effect of vitalizing a statute which was before inoperative. We think this position is not sound. The statute, in so far as it attempts to enlarge the jurisdiction of the county court, is not only inoperative, but is inert and was lifeless from its passage.

If the law-making body goes through the form of enacting a law, which it is prohibited by the Constitution from enacting, its action is wholly void and cannot be validated by a subsequent amendment to the Constitution so as to confer authority upon the legislature to pass such a law. *Seneca Mining Co. v. Osmun*, 82 Mich. 573; *Dewar v. People*, 40 Mich. 401; *Village of Mount Pleasant v. Vansice*, 43 Mich. 361; *Ex parte Sparks*, 120 Cal. 395; *Norton v. Shelby County*, *supra*.

"An act of the legislature, not authorized by the state Constitution at the time of its passage, is absolutely null and void, and is not validated by a subsequent adoption of an amendment to the Constitution authorizing it. *State v. Tuflly*, 20 Nev. 427. To the same effect, *Fleming v. Hance*, 153 Cal. 162.

It follows, therefore, that section 2, ch. 195, Laws 1905 (Comp. St. 1922, sec. 1194) did not and does not

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confer jurisdiction upon the county court to impose both a fine of \$500 and imprisonment for six months in the county jail, and that the subsequent amendment to the Constitution does not have the effect of vitalizing such statute.

Petitioner is therefore unlawfully deprived of his liberty, and it was error for the district court to deny the writ of habeas corpus. The judgment of the district court is reversed and the cause remanded, with directions to allow the writ and release the petitioner from his unlawful imprisonment.

REVERSED.

EDWARD PERRY, APPELLEE, v. CHARLES MEYER, JR.,
APPELLANT.

CHARLES MEYER, JR., APPELLANT, v. EDWARD PERRY,
APPELLEE.

FILED MAY 15, 1923. No. 22385.

1. **Contracts:** RESCISSION. The principal relief to be effected by a rescission of a contract is to place the parties in substantially the same condition as they were in prior to the making of the contract. It is incumbent upon one seeking the rescission of a contract, where the parties cannot be placed in *statu quo*, to furnish to the court such evidence that it can do equity between the parties.
2. **Vendor and Purchaser:** RESCISSION. "Where, with knowledge of all the facts on which a rescission of a contract for the sale of land may be based, the vendee does some act which prevents him from placing the vendor in *statu quo* he cannot claim a rescission of the contract." *Stewart v. Tate*, 103 Neb. 28.

APPEAL from the district court for Wayne county:
ANSON A. WELCH, JUDGE. *Affirmed*.

W. K. Amick, for appellant.

A. R. Davis and C. H. Hendrickson, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and
GOOD, JJ., BEGLEY, District Judge.

GOOD, J.

Edward Perry commenced an action against Charles

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Meyer, Jr., to foreclose a real estate mortgage, given to secure a part of the purchase price of 365 acres of land sold and conveyed by Perry to Meyer. Charles Meyer, Jr., commenced an action against Edward Perry to rescind the contract of sale of said land and for a cancellation of the mortgage on the ground that a merchantable title to the land had not been furnished. The two actions were consolidated and tried together, resulting in a decree foreclosing the mortgage and a dismissal of the cross-action for a rescission of the contract and cancellation of the mortgage. Charles Meyer, Jr., has appealed. Hereafter in this opinion Edward Perry will be referred to as plaintiff and Charles Meyer, Jr., as defendant.

On July 26, 1919, the parties entered into a written contract which provided that plaintiff would, on March 1, 1920, furnish a good and sufficient abstract of title and warranty deed to the 365 acres of land, and that defendant would pay therefor the sum of \$135,375, of which \$5,000 was to be paid in cash, and on March 1, 1920, the further sum of \$25,000 was to be paid and a mortgage given on the land to secure the sum of \$105,375. When March 1, 1920, arrived, plaintiff was not able to furnish a merchantable title to the land, but both parties were desirous of carrying out the contract. It was then arranged that plaintiff would, not later than November 1, 1920, perfect title to the land and furnish abstract showing merchantable title, and he then gave to the defendant a bond in the sum of \$10,000, with surety, that title would be perfected, and that defendant should be held harmless from all loss, expense and damage by reason of said title being defective. Thereupon plaintiff delivered a warranty deed and possession of the lands to the defendant, who then paid the \$25,000 of the purchase price then due, and executed and delivered to plaintiff a mortgage for \$105,375.

The record shows that plaintiff immediately took steps to correct the defects in the title which had been pointed

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out by counsel for defendant, and, among other things, an action to quiet title was prosecuted in the name of defendant, who verified the petition and signed the affidavit for service by publication, which action was prosecuted to a final decree, quieting the title in the name of the plaintiff in that action, the defendant herein. Apparently, when all of the defects which had been pointed out by counsel for defendant had been, or were about to be, fully complied with, defendant discharged his attorney and employed others, who in turn examined the abstracts and pointed out some additional defects. Plaintiff then attempted to comply with these requirements, and, apparently when the defects were about to be removed so as to satisfy defendant's counsel, defendant again discharged his counsel, employed still another, who declared the title not merchantable, and demanded a rescission of the contract. Plaintiff began the action of foreclosure on the 3d day of March, 1920, and defendant began the action for rescission a few days later. The record shows that defendant had been in possession of the lands for a little more than a year and received the rents, profits and income therefrom; that he had cut and manufactured into lumber a considerable quantity of timber, which was growing upon the premises, and had removed therefrom certain fence posts, gates, wires and other material.

Defendant alleges in his cross-petition that on the 1st of March, 1920, he was induced to accept a deed to the premises, make the cash payment of \$25,000 and execute a mortgage for the remainder of the purchase price of the premises, upon the promise and representation of the plaintiff that he would, not later than November 1, 1920, perfect title to the land so as to make it marketable, and in the event of failure so to do, he would cancel the sale contract. While the evidence on this question is conflicting, the trial court found against defendant on this proposition, and from a careful examination of the

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evidence we are of the opinion that the finding is supported by a preponderance of the evidence.

The trial court made elaborate findings as to each of the defects alleged to exist in the title, and found against defendant on each and every one of them, and that a good, merchantable title to the whole premises was vested in the defendant; and further found that the real estate in question had decreased in value to the extent of 30 per cent., and that the final objections by defendant to the title are technical and unsubstantial, and not such as would cause an ordinarily prudent man, desiring to purchase land and acquire title thereto, to entertain a just apprehension of future trouble therefrom, and that the objections to title were not for the purpose of having plaintiff perfect title, but were made in order to enable defendant to claim grounds for rescission of the contract, and for a recovery of the part purchase price paid, and to avoid liability for the balance of the purchase price remaining unpaid. The court also found that, by reason of the cutting of the timber and the removal of material from the premises, the parties could not be placed in *statu quo*, and for that reason the defendant was not entitled to a rescission of the contract.

We have examined the record and find that most, if not all, of the objections to the title are not substantial or meritorious, and some are positively frivolous. We do not deem it necessary, however, to consider the objections in detail, because we are of opinion that defendant is not in a position to demand a rescission of the contract.

1. It is a general and well-established rule that there can be no rescission of a contract unless the parties can be placed in *statu quo* or substantially so. *Bell v. Keepers*, 39 Kan. 105; *Mather v. Barnes, Keighley & Greer*, 146 Fed. 1000; *Carlton v. Hulett*, 49 Minn. 308; *Whitlock v. Deulinger*, 59 Ill. 96; *Vaughn v. Smith*, 34 Or. 54; 39 Cyc. 1423. The principal relief effected by rescission is to place the parties in the same condition as they were in before the making of the contract sought to

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be rescinded. It is incumbent upon one seeking the rescission of a contract, where the parties cannot be placed in *statu quo*, to furnish to the court such evidence that it can do equity between the parties. The record in this case shows that defendant received the rents, income and use of the 365 acres for one year. It shows that he cut and removed a large number of trees and removed from the land gates, fence posts and wires, but there is not one scintilla of evidence in the record to show what was the value of the use and occupation of the land, or of the timber cut, or of the materials removed from the premises. Defendant failed to furnish the court with any evidence by which it could determine the amount that defendant should be charged as an equivalent for the things received by him, and do justice and equity.

2. The record discloses that, after defendant knew of the defects in the title of which he complains, he continued to cut timber and convert it into lumber. This is an act inconsistent with a right to rescind. "Where, with knowledge of all the facts on which a rescission of a contract for the sale of land may be based, the vendee does some act which prevents him from placing the vendor in *statu quo* he cannot claim a rescission of the contract." *Stewart v. Tate*, 103 Neb. 28.

The fact that after defendant knew there were defects in the title he consented to accept a deed and went into possession of the land, and at the same time took a bond from the plaintiff to indemnify him and hold him harmless from all loss, expenses and damage by reason of said title being defective, clearly indicates a purpose to accept the title and rely upon an action upon the bond for damages, in the event that title was not perfected according to the contract.

We are clearly of the opinion that defendant was not entitled to a rescission of the contract, and it therefore follows that the decree of the district court in denying

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a rescission and awarding foreclosure of the mortgage is right, and it is therefore

AFFIRMED.

BILLY GEORGIS ET AL., V. STATE OF NEBRASKA.

FILED MAY 15, 1923. NO. 22981.

1. **Criminal Law:** EVIDENCE UNLAWFULLY OBTAINED: ADMISSIBILITY. "Where articles or information are offered in evidence, which are pertinent to the issue, the court will not exclude them because they may have been obtained in an irregular or illegal manner." *Billings v. State*, 109 Neb. 596.
2. ———: CONSPIRACY: DEFENSES. It is no defense to a criminal prosecution for conspiracy to obtain money from another by a confidence scheme, which, had it been successful, would amount to grand larceny, that the person to be defrauded intended to participate in an unlawful transaction.
3. ———: INSTRUCTIONS. Before error can be predicated upon the failure to charge the jury upon a given point, there must have been a request therefor, unless it is upon a question where a statute or positive rule of law requires the giving of such instruction.
4. **Larceny.** If a person obtains possession of money from the owner by fraud, with the intent to appropriate the same to his own use and deprive the owner of his property therein, the taking is larceny; and, where fraud is practiced to obtain possession, no actual violence is necessary, for the fraud takes the place thereof.

ERROR to the district court for Douglas county:
CHARLES LESLIE, JUDGE. *Affirmed.*

Organ & Bohan and J. R. Lones, for plaintiffs in error.

O. S. Spillman, Attorney General and *Lee Basye*,
contra.

Heard before MORRISSEY, C. J., ALDRICH, DAY and
GOOD, JJ., BUTTON, District Judge.

GOOD, J.

Billy Georgis and Louis S. Dochoff, plaintiffs in error and hereinafter referred to as defendants, have brought this case to this court for a review of the record of their conviction upon an information, charging them with the

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offense of conspiring to commit grand larceny. Each of the defendants was sentenced to imprisonment in the state penitentiary for a term of two years and to pay a fine of \$10,000.

The evidence indicates that defendants represented to one Todoroff that they could purchase from the secretary of the United States treasury paper like that used in making United States currency, but that it could be purchased only in quantities costing \$10,000, and which quantity, when printed, would make \$1,500,000 in counterfeit money that would pass as genuine, and that they possessed a machine for printing counterfeit money; that they had \$6,700 and required \$3,300 more, in order to purchase a consignment of paper. They attempted to persuade and induce Todoroff to furnish the \$3,300 for the unlawful purpose. Todoroff was shown samples of the paper and a new \$5 bill, which they claimed was one that had been recently made. Todoroff feigned interest in their proposition and promised to furnish \$3,000 for the unlawful scheme. He suggested giving them a check, but they insisted on having money and in large denominations, preferably \$100 bills. He promised to go to the bank and get the money, and fixed upon a time and place when and where he would meet them and turn over to them the \$3,000. Todoroff then communicated with officers of the United States secret service, and was furnished a package of counterfeit bills, which he was instructed to turn over to them instead of the real money. He met them at the time and place agreed upon and turned over the package of counterfeit bills, and instantly the defendants were arrested by the officers of the law. They were searched, and, after disclosing where their room was in an Omaha hotel, police and United States secret service officers visited their room, made some observation therein, and then a little later, with one of the defendants, returned to the room and searched the same and took therefrom papers and documents, some of which

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were of an incriminating nature and which were used as evidence in the trial of the case.

1. Prior to the commencement of the trial, the defendants filed a motion in which they represented that certain documents and papers that were their private property had been unlawfully taken and removed from their custody and possession without their consent, and asked the court to enter an order directing the return of the property so taken from them. This motion was overruled, and the ruling thereon is assigned as error.

When some of these papers and documents, so taken, were offered in evidence, the defendants objected thereto, because they had been unlawfully taken from them, in violation of the provisions of both the federal and state Constitutions against unreasonable searches. This question has recently received careful attention in this court in the case of *Billings v. State*, 109 Neb. 596, wherein it was held: "Where articles or information are offered in evidence, which are pertinent to the issue, the court will not exclude them because they may have been obtained in an irregular or illegal manner." In that case, as in this, before trial motion was made for a return to the defendant of the articles seized by the officer. It is true that in that case the officer had a search warrant, but the articles seized were not on the premises described in the search warrant, and the decision is not based upon the fact that the officer had held a search warrant to search certain premises other than those where the articles were found. In that case there is a full discussion of the question and citation of the authorities.

2. Defendants contend that the evidence fails to disclose an indictable conspiracy, and argue that a conspiracy to be indictable must be one against an innocent person, and that the design of the law is not the protection of one rogue dealing with another, but rather to protect those who, for some honest purpose, are induced, upon fraudulent representations, to part with their money or property. The contention is unsound. It is

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immaterial whether Todoroff intended to participate in a scheme for the making of counterfeit money. It is needless to say that defendants had no intention of using his money to purchase paper from the secretary of the United States treasury, to be used in making counterfeit money. They schemed and conspired, by appealing to his supposed cupidity, to obtain his money. His intent or purpose could in no way lessen their culpability. It is no defense to a criminal prosecution for conspiracy to obtain money from another by a confidence scheme, which, had it been successful, would amount to grand larceny, that the person to be defrauded intended to participate in an unlawful transaction. *People v. Martin*, 102 Cal. 558; *Gilmore v. People*, 87 Ill. App. 128; *Perkins v. State*, 67 Ind. 270; *People v. Watson*, 75 Mich. 582; *Cunningham v. State*, 61 N. J. Law, 67; *Horton v. State*, 85 Ohio St. 13; *State v. Martin*, 226 Mo. 538; 25 Cyc. 43.

Defendants' contention is unsound because there is nothing in the evidence that warrants a belief that Todoroff ever intended to participate in any fraudulent or unlawful transaction.

3. It is assigned as error that the court failed to instruct the jury that defendants could not be convicted unless the testimony of Todoroff was corroborated. This is urged apparently upon the assumption that Todoroff was a coconspirator with the defendants. The evidence does not warrant any such assumption. Todoroff was a competent witness, and it was for the jury to determine the weight to be given his testimony. It may be further noted that defendants requested no such instruction. Before error can be predicated upon the failure to charge the jury upon a given point, there must have been a request therefor, unless it is upon a question where a statute or positive rule of law requires the giving of such instruction. *Gettinger v. State*, 13 Neb. 308; *Edwards v. State*, 69 Neb. 386; *Goemann v. State*, 94 Neb. 582; 16 C. J. 1058, sec. 2500.

4. Defendants contend that there is a variance be-

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tween the proof and the averments of the information; that the information charges a conspiracy to commit grand larceny, and that, if any offense is proved, it is a conspiracy to obtain money by false pretenses. The evidence is sufficient to sustain a finding that defendants conspired to obtain from Todoroff \$3,000 of his money, with the intent to deprive him of his property therein and to appropriate to the use of the defendants. If a person obtains possession of money from the owner by fraud, with the intent to appropriate the same to his own use and deprive the owner of his property therein, the taking is larceny. While it is generally true that in larceny the taking must be a trespass against the owner's possession, yet, where fraud is practiced to obtain possession, no actual violence is necessary, for the fraud takes the place of violence. *Crum v. State*, 148 Ind. 401; *State v. Dobbins*, 152 Ia. 632; 25 Cyc. 40.

Defendants complain that the judgment is too severe and the sentence excessive. Defendants attempted by fraud to deprive another of his earnings acquired by years of toil. No mitigating circumstances are shown. For the protection of society it is necessary that such detestable conduct should be severely dealt with. We have little sympathy for those who seek to cheat and defraud the unwary and unsophisticated. The defendants richly deserve the penalty imposed.

No prejudicial error is disclosed, and the judgment is

AFFIRMED.

JENNIE M. FILLEY, APPELLEE, v. GOLDIE DICKINSON,
APPELLANT.

FILED MAY 15, 1923. NO. 22405.

1. **Descent and Distribution:** REALTY OF HUSBAND. Under section 1224, Comp. St. 1922, the right of the wife to inherit the real estate of her husband is barred by the sale of such real estate under execution or other judicial sale during the lifetime of the husband.
2. **Dower:** LANDS SOLD AT FORECLOSURE. A decree of foreclosure of a

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mortgage on the husband's land, other than his homestead, and a sale thereunder during his lifetime, which was valid as to him, conveyed a valid title to the purchaser, and left no interest in the wife which will sustain her action to redeem said real estate after the death of her husband because she was not made a party defendant in the foreclosure proceedings.

3. **Homestead.** Evidence examined, and *held* to sustain the finding of the trial court that defendant has no right of homestead in the premises in controversy.

APPEAL from the district court for Lancaster county:
WILLIAM M. MORNING, JUDGE. *Affirmed.*

F. B. Baylor and *A. Moore Berry*, for appellant.

George N. Foster and *Bert A. Button*, *contra*.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

BEGLEY, District Judge.

This is an action in which the plaintiff prays that her title to certain real estate be quieted against the defendant, who it is alleged has no right or title therein. The defendant alleged that the title of the plaintiff depends upon a sale under foreclosure to which the defendant was not a party; that, as the widow of the mortgagor, the defendant has both the equity of redemption and right of homestead in the property, and that by reason of such fact the title of the plaintiff cannot be quieted against the defendant, and prays that her equity of redemption and homestead interest be adjudicated and established. The trial court found generally in favor of the plaintiff and entered a decree quieting title in the plaintiff, and defendant has appealed.

The evidence discloses that on March 6, 1906, John William Dickinson, the husband of the defendant, was the owner of lot 11, block 6, Elm Park addition to the city of Lincoln, Lancaster county, Nebraska; that he and the defendant herein, as husband and wife, executed a mortgage thereon to the Lincoln Savings & Loan Association, and that in 1915 said Lincoln Savings & Loan As-

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sociation foreclosed said mortgage against John William Dickinson without making his wife, the defendant herein, a party to the proceedings; that a sale was had under said decree of foreclosure and the property purchased by the Lincoln Savings & Loan Association, who went into possession thereof, and same was afterward sold to the plaintiff, Jennie M. Filley. John William Dickinson, former owner of the title to the property in question, died intestate on May 28, 1920, leaving surviving him the defendant, his widow, and two minor children.

The first question presented on appeal is whether a wife has an equity of redemption in her husband's property, and, if so, whether it can be cut off by the foreclosure of a mortgage without making her a party thereto. If appellant has any rights in the property in question as the widow of John William Dickinson, it must be by reason of statutory authority. In 1907 the statute abolished dower and curtesy. Comp. St. 1922, sec. 1223. By section 1220, Comp. St. 1922, it is provided that, when a husband shall die, leaving a wife surviving, all the real estate of which the deceased was seised of an estate of inheritance at any time during the marriage, which has not been lawfully conveyed or devised, and "which has not been sold under execution or judicial sale, * * * shall descend subject to his * * * debts and the rights of homestead," in a certain manner; in the present case being a one-third part to his surviving wife. As if to emphasize the above quoted provision, section 1224, in speaking of the right of the wife to inherit, provides: "Such right to inherit may also be barred by the sale of such real estate under execution or other judicial sale, during the lifetime of the owner of the title." Under these sections of the statute, during the lifetime of the holder of the title, the real estate, other than a homestead, may be sold under execution or judicial sale and the purchaser takes the title free from any claim of inheritance by the wife after the death of her husband. If, however, the husband dies prior to the judicial sale,

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the wife would become vested with an interest therein. These sections of the statute have been so construed in this state in the case of *Arent v. Arent*, 104 Neb. 562. In Iowa, where the statute contains similar restrictions as to dower, the court in the case of *Bowden v. Hadley*, 116 N. W. 689 (138 Ia. 711), held: "The decree of foreclosure of a mortgage on the husband's land and the execution sale, having been valid against him, terminated the wife's inchoate right of dower, and left her no interest which will sustain her action to have the sale decreed void because notice was not served on her in the foreclosure proceedings." The judicial sale in this case being valid as against the husband during his lifetime, the wife is not entitled to equitable relief as against the purchaser at said sale, or his subsequent grantees.

The next question presented for determination is whether in the instant case the property in question was the homestead of the owner, and therefore, after his death, exempt to his widow who was not a party to the foreclosure action. The evidence is in conflict as to the purpose for which the lot was purchased and the building erected thereon. The appellee's evidence discloses that appellant's husband obtained title to the disputed property in 1906, and he secured this loan for the purpose of erecting a house thereon. He, being a carpenter by trade, stated that his purpose was to build the house and sell it; that, after partly completing the house, he was unable to proceed further for want of funds and entirely abandoned the property; that he and his wife are colored people and the lot is located in a white neighborhood; that appellant and her husband had domestic trouble, and she was living apart from him in Iowa at the time of the foreclosure suit. The appellant and other witnesses testified that the intention was to occupy the premises as a homestead, when completed, and that only lack of funds and the foreclosure proceedings prevented the occupancy. There being no actual occupancy of the premises and the evidence not being clear as to the *bona*

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fide intention to occupy the premises as a homestead, the finding of the trial court that defendant had no homestead interest therein is right, and the decree of the district court is, therefore,

AFFIRMED.

PAUL MCCOY V. STATE OF NEBRASKA.

FILED MAY 15, 1923. No. 22775.

Criminal Law: MOTION FOR NEW TRIAL. The district court has no jurisdiction to permit an amendment to a motion for a new trial in a criminal case, when motion therefor is filed eight days after the expiration of the three-day period provided by statute and four days after the term at which the verdict was rendered.

ERROR to the district court for Lancaster county:
ELLIOTT J. CLEMENTS, JUDGE. *Affirmed.*

Frank C. Yates and Hugh C. Wilson, for plaintiff in error.

O. S. Spillman, Attorney General, and George W. Ayres, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

BEGLEY, District Judge.

The plaintiff in error was tried and convicted in the district court for Lancaster county, Nebraska, on January 17, 1922, of the crime of robbery. Two days after he was found guilty he filed in the district court a motion for a new trial; the same omitted grounds of newly discovered evidence, and made no mention of additional evidence obtained after the trial as grounds for a new trial. The term of court was adjourned on January 26, 1922, and on January 30, 1922, four days after the adjournment of the term, and while the original motion was pending, plaintiff in error filed a motion to supplement and amend the original motion by setting out the ground of newly discovered evidence material to his defense, which he could not with reasonable diligence have discovered and

produced at the trial. This motion was overruled on January 30, 1922, and at said time the court also overruled the motion for a new trial, and defendant was thereupon sentenced to imprisonment in the state reformatory for a period of not less than three years nor more than fifteen years at hard labor. The plaintiff in error has brought the case to this court for review.

The only claim of error made is that the court erred in refusing to permit him to amend the original motion for a new trial after the adjournment of the term and before the hearing on the original motion. The motion to amend the original motion was supported by an affidavit of the complaining witness, James Hand, who on the trial had positively identified the defendant as the man who committed the robbery upon him, who stated that since testifying, by reason of investigations and examinations personally made, he would, if called as a witness, qualify his testimony already given to this extent: "That the man who held him up on December 21, 1921, resembled Paul McCoy, but that affiant would testify, if called at this time, that Paul McCoy was not the man who held him up." The materiality and importance of this evidence cannot be denied. Hand was the only witness for the state and positively identified the defendant as the man who committed the robbery. The only question involved is as to the jurisdiction of the court to entertain such an amendment after the time for filing the motion for a new trial and after the term has adjourned.

Whatever may be the holding in other states, the law seems to be well settled in Nebraska that such a motion cannot be entertained. No such provision is found in the statute, section 10158, Comp. St. 1922. *Dodge v. People*, 4 Neb. 220.

"The authority of the district courts to grant new trials in criminal cases, and especially after the term at which a conviction is had, must, we think, if existent, be found in the statute, and, if not there, the remedy

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shall be an appeal to the executive, who is clothed with the pardoning power." *Hubbard v. State*, 72 Neb. 62. The syllabus reads: "The district court possesses no inherent or common-law power to grant new trials in criminal cases, on the ground of newly discovered evidence, at the subsequent term to that at which a verdict was found."

In *Evers v. State*, 87 Neb. 721, we held: "The district court has no jurisdiction to grant a new trial, in a criminal case, upon application by petition signed after the term of the trial."

In *Fouse v. State*, 83 Neb. 258, it is held: "This court will not review an order made by a district court refusing a defendant permission to file an amendment to his motion for a new trial, where such application is made more than three days after the return of the verdict."

In *Lillie v. State*, 83 Neb. 268, the defendant, more than three days after the return of the verdict, by leave of court, was permitted to file an amendment to his motion for a new trial. He did not claim that he was unavoidably prevented from including said assignment in his motion for a new trial, which was filed within time. It was held that the refusal of the court to grant a new trial for any reason set out in said amendment will not be reviewed in this court.

These cases seem conclusive of the point raised by appellant, and, no reason being advanced as to why the statutory ground of newly discovered evidence was not included in the assignment in his motion for a new trial, the court was right in overruling said motion.

The judgment of the court is, therefore,

AFFIRMED.

STATE, EX REL. L. N. BUNCE, APPELLANT, V. CHARLES H. KUBAT ET AL., APPELLEES.

FILED MAY 15, 1923. No. 23291.

1. **Justice of the Peace.** Sections 1, 18, and 19, art. V of the Con-

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stitution, authorize the legislature to provide for the election of justices of the peace within such districts, for such term, and to have and exercise such uniform jurisdiction, as the legislature may provide by law, and the legislature is further authorized to substitute other courts for justices of the peace within said districts.

2. ———: DISTRICTS. Section 202, Comp. St. 1922, apportions the state into justice of the peace districts with uniform jurisdiction, and therefore does not violate section 19, art. V of the Constitution.
3. ———: MUNICIPAL COURTS. Sections 1915 and 1916, Comp. St. 1922, substitute the municipal court for that of justice of the peace in districts having a metropolitan city, within the meaning of section 1, art. V of the Constitution.

APPEAL from the the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

Joseph O. Burger, for appellant.

W. W. Slabaugh and Henry Beal, *contra*.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and
GOOD, JJ., BEGLEY, District Judge.

BEGLEY, District Judge.

Action in mandamus to compel the county commissioners of Douglas county to approve a hold-over bond of relator as justice of the peace. Relator was the duly elected and qualified justice of the peace of district No. 16, Douglas county, Nebraska, for the term of two years ending on January 4, 1923. In 1921 a statute was enacted providing that, in each justice of the peace district in which there was located a city of the metropolitan class, "municipal courts, as heretofore or hereafter established, are hereby substituted by law for the justice of the peace within such district." Said act was not to take effect until after the term of office of the present incumbents should have expired, which would be on the first Thursday after the first Tuesday in January, 1923. Sections 1915, 1916, Comp. St. 1922. By reason of these provisions no election was held for justice of the peace in district No. 16, and relator contends that said sections, together with section 202, are unconstitutional and void as

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being in conflict with section 19, art. V of the Constitution, and he is entitled to qualify and hold over. A demurrer was sustained to the alternative writ, and, relator refusing to plead further, the action was dismissed and relator has appealed.

The first question presented is as to the limitation placed on the legislature under the provisions of article V of the Constitution. Section 1 provides:

"The judicial power of the state shall be vested in a supreme court, district courts, county courts, justices of the peace, and such other courts inferior to the supreme court as may be created by law; but other courts may be substituted by law for justices of the peace within such districts, and with such additional civil and criminal jurisdiction as may be provided by law."

Section 18, provides: "Justices of the peace shall be elected in and for such districts for such term and have and exercise such jurisdiction as may be provided by law."

Section 19 provides: "The organization, jurisdiction, powers, proceedings, and practice of all courts of the same class or grade, so far as regulated by law, and the force and effect of the proceedings, judgments and decrees of such courts, severally, shall be uniform."

These sections were adopted in 1920 as amendments to the Constitution of 1875. Formerly the Constitution contained no provision for substituting other courts for justices of the peace, and the legislature had attempted to establish municipal courts with exclusive jurisdiction within the limits of counties over all civil matters up to \$1,000. This court held that the legislature had no such authority under the Constitution. *State v. Magney*, 52 Neb. 508. It was the purpose of the framers of these amendments to the Constitution to broaden the constitutional provision to permit such legislation. To carry out the intent and purpose of the several sections, it is necessary to harmonize them, if possible, and, if found inconsistent, then section 1, being a special provision for

substitution of justice courts, must prevail over section 19, containing a general provision for uniformity. The sections, when read together, authorize the legislature to provide for the election of justices of the peace within such districts, for such terms and to have and exercise such jurisdiction as the legislature may desire; said jurisdiction and powers, however, to be uniform; and the legislature is further authorized to substitute other courts for justices of the peace within said districts. This, then, calls for an examination of two questions: (1) Did the legislature apportion justice of the peace districts throughout the state with uniform jurisdiction? (2) If so, did the legislature thereafter legally substitute a municipal court for the justice of the peace court in district No. 16?

The assault made on the uniformity of justice of peace districts apportioned under section 202, Comp. St. 1922, is that counties are adopted as a political unit of dividing the state into justice districts, except Douglas county, wherein two districts are created. Each justice in 92 districts has jurisdiction over his entire county, whereas the justice in district No. 16 is limited to Omaha and district No. 15 is limited to territory outside of Omaha in Douglas county. Relator cites *State v. Magney*, 52 Neb. 508, and *People v. Meech*, 101 Ill. 200, to support this proposition. These cases would apply were it not for the increased grant of power under the constitutional amendments. The power to substitute other courts for justice of the peace districts necessarily presupposes the right to apportion such districts territorially so as to permit such substitution. The legislature in apportioning the districts had in view the distinction between the administration of justice in a metropolitan city and in outside districts, and by making the territorial jurisdiction of district No. 16 coextensive with the city of Omaha they provided that the laws of the state should be administered by a justice of the peace within the city, not as a mark of distinction or difference as to that dis-

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trict, but for the convenience of the people within the district. This did not violate the rule as to uniformity. Each justice of the peace exercised the same powers and jurisdiction within his district as every other justice. "If a law is general and uniform throughout the state, operating alike upon all persons and localities of a class, or who are brought within the relations and circumstances provided for, it is not objectionable as wanting uniformity of operation." *State v. Berka*, 20 Neb. 375.

This brings us to the second question. Had the legislature, after apportioning the justice of the peace districts, passed a special act substituting a municipal court for the justice of the peace court in district No. 16, no question could have been raised as to the constitutionality of the act, but relator's complaint is that the legislature attempted to make a general substitution of all municipal courts, with a jurisdiction limited to the boundaries of metropolitan cities, for justice of the peace courts with different territorial limits. It will be noted the law provides for two kinds of substitution—one of courts heretofore established, and another of courts hereafter to be established. It is not necessary to decide as to the validity of the provision relating to courts hereafter to be established, as this feature of the act has no application to the present case, and, as the remainder is a completed act, it will be disregarded. *Redell v. Moores*, 63 Neb. 219. The only municipal court heretofore established was the municipal court within the city of Omaha, and its territorial limits were coextensive with the limits of district No. 16. By substituting the municipal court for the justice of the peace court in Omaha, the legislature was merely carrying out the purpose of the constitutional amendments by adopting a scheme of local government for the city of Omaha, whereby the ordinances of the city and laws of the state might be enforced through one court, thereby abolishing the offices of justice of the peace and police magistrate within the city and providing an adequate system of pro-

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cedure to carry out the plan arranged for. The legislature having first apportioned the state into justice of the peace districts with uniform jurisdiction, and then having established municipal courts in cities of the metropolitan class, with powers of the justice of the peace court and with the territorial limits equal to a justice of the peace in district No. 16, and having thereafter substituted the municipal court for justice of the peace court in district No. 16, the office of justice of the peace in district No. 16 was abolished and the relator was not entitled to hold over as justice of the peace within said district.

The judgment of the district court in sustaining the demurrer is therefore

AFFIRMED.

VILLAGE OF DAVENPORT, APPELLEE, v. MEYER HYDRO-ELECTRIC POWER COMPANY, APPELLANT.

FILED MAY 15, 1923. No. 22368.

1. **Electricity:** FRANCHISE: ESTOPPEL. Ordinance 48, with the acceptance thereof, constituted the franchise contract under which the parties to this controversy operated. And where, as in this instance, the village had the power to contract for electric current for 25 years, following the legislation of the year 1919 (Laws 1919, ch. 49), and the parties continued, after this legislation, to operate under such contract, and where to have cut off the current would have worked an irreparable injury to the inhabitants of the village and caused injustice and a legal wrong, the company was estopped to claim the village acted *ultra vires* at the time it entered into the contract in 1915.
2. ———: ———: RATES: EVIDENCE. In this action the question of rates was not involved, and the trial court ruled correctly in excluding all testimony on this subject, as the right of the village to compel the service rested upon the contract only.

APPEAL from the district court for Nuckolls county:
LEONARD W. COLBY, JUDGE. *Affirmed.*

Buck & Brubaker and George A. Lee, for appellant.

M. S. Gray and Charles H. Sloan, contra.

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Heard before MORRISSEY, C. J., LETTON, DEAN and DAY, JJ., BUTTON, District Judge.

BUTTON, District Judge.

In the year 1915 the village of Davenport, Nebraska, and Ernest Meyer entered into a contract, whereby Meyer agreed to furnish electric current to the village at rates specified in the contract, and the village agreed to accept such current and pay therefor. To this end ordinance No. 48 was passed, whereby a contract was tendered Meyer for a term of 25 years. This ordinance fixed a minimum and maximum rate, and provided for current for Meyer for milling purposes, and contained many provisions unnecessary to recite herein. This tender was accepted by Meyer, in what is termed a contract, of date May 21, 1915. This ordinance, contract and written acceptance, constituting one contract, was consummated by the parties by Meyer bringing into the village the current and the village receiving the same and paying therefor. All went well for the five years mentioned in the written acceptance and for more than one year thereafter. The Meyer Hydro-Electric Power Company, of which Meyer was president, was the real party in interest, and, after furnishing the service for six years, claimed it could no longer furnish current at contract rates, as they were no longer compensatory, and had, in fact, become confiscatory, on account of changed conditions, and the company threatened to discontinue the service unless the village would pay a higher rate. This the village refused to do, and began injunction proceedings, which resulted favorably to appellee, and appellant has appealed to this court.

Ordinance No. 48, conveying the franchise, and the acceptance thereof, was the contract. *Vicksburg v. Vicksburg Water-Works Co.*, 206 U. S. 496; McQuillen, Municipal Ordinances, sec. 565.

Appellant claimed this contract was *ultra vires* on the part of the village and void. Appellee met this conten-

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tion with a plea of estoppel. We will dispose of this question of estoppel first, for, if it be sustained, many other questions are eliminated.

The village stood upon its contract and sought its enforcement. The Meyer Hydro-Electric Power Company also wished to stand upon its contract, but desired to prevent the village from doing so, because, as it asserted, under the law as existing in 1915, the village had no express or implied power to enter into such contract. The company did not offer to surrender its franchise and repudiate the contract which it claimed was void; rather, the company insisted upon its contract, said to the village, in effect: "We had a contract with you but, on account of changed conditions you must now pay a higher rate than provided therein, and if you do not do it we will shut off your current until you do. In the meantime, we shall retain our franchise, we shall maintain our lines, we shall continue the right to furnish the current to ourselves. You have always paid us for the current in the past, and we intend you shall do so in the future at a higher rate, and, in short, we intend to stand upon, and insist upon, our contract; but you must pay a rate which will be compensatory and not confiscatory as we claim the present rate is."

The Meyer Hydro-Electric Power Company asked for a 10-year contract and got a 25-year contract. A letter, of the date January 13, 1921, contains a threat to cut off the service, and also the following language, to wit: "We have gone to considerable expense installing another power unit in view of improving our service, and hope to have same in operation soon. I think you gentlemen will agree with us that no business will continue very long if not maintained on a paying basis. Therefore we are asking for a small increase in rates, as we would like to continue in business. Hoping you gentlemen may see fit to reconsider our proposition, we remain, Meyer Hydro-Electric Pwr. Co." It seems clear, therefore,

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the company wished to stand upon its contract, but desired a higher and compensatory rate.

The company asserts in its brief "that an illegal and void contract cannot be made the groundwork of an estoppel," and cites a long line of authorities to support this contention. We have no quarrel with these decisions in a proper case; but it is equally elementary that one cannot stand upon and ask performance of a contract and at the same time declare the contract illegal and void. The company is estopped to assert the invalidity of this contract.

We believe the company is estopped to claim the village acted *ultra vires*. To cut off the service from the village now would work an irreparable injury to its inhabitants, endanger life, and property, and health. It is altogether possible that the village acted irregularly in entering into this contract for 25 years in the year 1915. But since the legislation of 1919 (Laws 1919, ch. 49) the village does have the power to operate under such a contract. Both parties to the contract have recognized this fact by acting under it. And, as stated in *Central Power Co. v. Central City*, 282 Fed. 998: "Nor will it avail the company to contend that the 1919 act required adoption of such contracts in a particular form, namely, by popular vote. This contract was an exercise of the proprietary or private business powers of the city, rather than a governmental power, and where dire injury would, as here, result from sustaining a plea of *ultra vires*, the form of exercising a given power of this character will not be permitted to work injustice. *Bell v. Kirkland*, 102 Minn. 213, 13 L. R. A. n. s. 793, 120 Am. St. Rep. 621."

The village probably had the power to enter into a contract like the one involved, but for 5 years instead of 25 years. If the village had the power to contract for electric current, mere irregularities, such as making it for 25 years and without proper appropriations, did not take away the power. And what was more, appellant had always received its pay for the service. .

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If this contract had been entered into since the legislation of 1919, exactly as it was in 1915, but without submission to a vote, and the parties had acted under it, this would be a mere irregularity, and would not have taken away the power of the village and made possible the defense of *ultra vires*. *Stickel Lumber Co. v. City of Kearney*, 103 Neb. 636; *Rogers v. City of Omaha*, 80 Neb. 591.

Both parties having ratified and acted under the contract of 1915, since the legislation of 1919, had recognized the power of the village to operate under such a contract, even if the village had not the power previous to 1919, which is not conceded, and the doctrine of estoppel was available to the village as a defense. And, further, we do not believe the doctrine of *ultra vires* was available where it would have defeated the ends of justice and worked a legal wrong as in this case. *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258; *In re Waterloo Organ Co.*, 134 Fed. 341; *Red Cross Protective Society v. Wayte*, 171 Fed. 643; *Central Power Co. v. Central City*, 282 Fed. 998.

There was in the answer a plea that the contract rates, on account of changed conditions, were no longer compensatory, and, in fact, had become confiscatory, and appellant's property about to be taken without due process of law, and its private property about to be taken for public use without just compensation; and evidence was offered tending to sustain this contention and was rejected by the court. This action of the trial court is now assigned as error.

The court had nothing to do with rates and was correct in sustaining objections to this line of evidence. On account of mutuality of interest, if the company were permitted to escape from its contract because rates were not compensatory, then, applying the same logic, the village could have defeated the contract if it could have shown the rates in excess of compensatory. In the last analysis there could be no such thing as a contract. Men

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have made bad contracts and have been ruined financially; but this is no reason for abrogating contracts. Corporations sometimes do likewise, but their contracts must be held inviolate. The right of the village, in this action, to compel the service rested on the contract, and only on the contract.

The judgment of the trial court is right, and is

AFFIRMED.

CLARENCE S. PETERSON ET AL., APPELLEES, v. LOUIS F. KUHN ET AL., APPELLANTS.

FILED MAY 15, 1923. No. 22375.

1. **Principal and Agent:** OSTENSIBLE AUTHORITY. "Ostensible authority to act as agent may be conferred if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency." *Thomson v. Shelton*, 49 Neb. 644.
2. **Bills and Notes:** NEGOTIABILITY. Under sections 5950-5954, Comp. St. 1922, a promissory note, secured by a real estate mortgage which provides that the mortgagor shall pay the taxes levied against the mortgage or debt secured thereby, is negotiable, notwithstanding the fact that the note and mortgage are parts of a single transaction.
3. **Evidence** examined, and *held* that the lower court was right in rendering judgment in favor of the administrator and against the maker of the note.

APPEAL from the district court for Hamilton county:
GEORGE F. CORCORAN, JUDGE. *Affirmed.*

Charles L. Whitney and Horth & Ryan, for appellants.

Hainer, Craft, Edgerton & Fraizer and J. H. Grosvenor,
contra.

Heard before MORRISSEY, C. J., ALDRICH, DAY and GOOD,
J.J., BUTTON, District Judge.

BUTTON, District Judge.

This was an action to foreclose a mortgage for \$800 against lot 12, block 17, South addition, Aurora, Nebraska. Louis F. Kuhn, on April 17, 1918, procured a loan

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from W. C. Wentz Company and gave his note to the company therefor, secured by a mortgage on the real estate as above. The W. C. Wentz Company sold and assigned this note and mortgage to Clarence S. Peterson for \$800 before maturity. Peterson took the note and mortgage and deposited them in the Fidelity State Bank of Aurora, Nebraska. When the interest fell due the bank notified Kuhn, but was reminded that the note and interest coupons were payable at the W. C. Wentz Company. The bank collected the interest at the office of said company. Before the note was due Kuhn sold the real estate to John Lulow. Lulow refused to assume the mortgage against the real estate, so Kuhn undertook to pay off the indebtedness, and did pay to the Wentz Company the amount thereof, but failed to obtain the note and procure the release of the mortgage. When the note fell due this action was instituted, and Lulow and Kuhn were made parties defendant. John Lulow died, and now Charley Lulow, as administrator of John Lulow's estate, has been substituted. The administrator asked that he be given judgment against Kuhn for the amount due in case the court found for appellee Peterson. The court found for appellee Peterson and determined the amount due and awarded foreclosure and gave the administrator judgment against Kuhn. Kuhn has appealed to this court and now seeks a reversal of the judgment and decree of the lower court.

Appellants now contend the W. C. Wentz Company was the agent of Peterson, and hence the payment to the company discharged the debt. And appellants also contend the note was nonnegotiable and that payment to the original mortgagee is payment to the holder. There is no evidence at all that the W. C. Wentz Company was authorized by Peterson to act for him. Appellants contend, however, that since the note and coupon interest notes recited on their faces that they were payable at the W. C. Wentz Company, and that the Fidelity State Bank,

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agent for Peterson, collected the interest there, these facts gave the Wentz Company ostensible and apparent authority to collect the same, and payment to said company discharged the debt and satisfied the mortgage.

Ostensible authority, as used in the law of agency, pre-supposes the existence of the relation of principal and agent. This relation may exist by express words or agreement of the parties, or it may result from conduct of the parties such as will estop them from denying the relation. In the case at bar, Peterson's agent did exactly what the interest coupon notes required it to do, that is, presented the notes at the W. C. Wentz Company for payment. This provision was placed in the notes for the accommodation of the maker and Peterson had nothing to do with it. Manifestly it was the duty of the maker, when he attempted to pay the note, to demand and procure it at the time of payment. He cannot now escape from his own careless act, because Peterson accepted his interest at the hands of the company where Kuhn, as maker of the notes, said the holder of the notes should receive it. Peterson never had but the one transaction with the W. C. Wentz Company. This was the purchase of the note and mortgage. Peterson immediately took the note and mortgage to his bank and had no more to do with the Wentz Company nor any member thereof. Under such circumstances the evidence is entirely insufficient to show authority of the W. C. Wentz Company to act for Peterson for any purpose.

"Ostensible authority to act as agent may be conferred if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency." *Thomson v. Shelton*, 49 Neb. 644; *Rehmeyer v. Lysinger*, 109 Neb. 805; *Holt v. Schneider*, 57 Neb. 523; *Phoenix Ins. Co. v. Walter*, 51 Neb. 182. See, also, *Creighton v. Finlayson*, 46 Neb. 457; *Brown v. Eno*, 48 Neb. 538; *Gilbert v. Garber*, 62 Neb. 464; *Campbell v. O'Connor*, 55 Neb. 638.

Appellants further contend that the note was non-negotiable, and hence Peterson had notice that payment could be made at the W. C. Wentz Company. The cases of *Garnett v. Meyers*, 65 Neb. 287, *Consterdine v. Moore*, 65 Neb. 296, *Bradbury v. Dillon*, 65 Neb. 300, and *North-ern Counties Investment Trust v. Edgar*, 65 Neb. 301, 303, are cited in support of this contention.

The principle of negotiability is that the instrument must show on its face certainty as to the amount to be paid at maturity. Hence, a note and mortgage securing it, executed as part of a single transaction, when construed together, may contain provisions that will render the note nonnegotiable. The above decisions were rendered in 1902. The court, applying the above principle in the above cases, said that the language in the mortgage, "the said parties of the first part hereby agree to pay all the taxes and assessments levied upon * * * the holder of the mortgage for and on account of the same," produced this uncertainty and rendered the note non-negotiable. The court then held that the maker, without notice of a transfer, could make payment to the payee named in the note and mortgage. The court said such agreement rendered the amount that the holder of the note could demand on the indebtedness itself uncertain, and the note nonnegotiable in the hands of one who took it with notice. In 1911 there was some legislation on the subject. This legislation was amended later and is now found as sections 5950-5954, Comp. St. 1922. Section 5952 reads in part as follows:

"When any mortgage contains a condition that the mortgagor shall pay the tax levied upon the mortgage or the debt secured thereby, the mortgage shall not be entered for separate assessment and taxation, but both interests shall be assessed and taxed to the mortgagor or owner of the real estate. An agreement of this character in the mortgage shall not destroy the negotiability of any note secured thereby."

Prior to this legislation, if the mortgagor failed to

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live up to his contract, contained in the mortgage, to pay the taxes, the mortgagee had to pay them and add them to his mortgage, for the taxes ran against the mortgagee. This rendered uncertain the amount to be paid at maturity of the note, and the note and mortgage, being parts of a single transaction, were construed together, and the maker of the note, without notice of a transfer of the note and mortgage, could make payment to the original payee.

Since the above legislation, no uncertainty exists. Where the mortgagor agrees to pay the taxes, they are assessed against him and become a lien against his land, and the mortgagee's note and mortgage remain absolutely definite and certain as to the amount due at maturity. It might be noticed in this connection, also, that the negotiable instruments act, section 4616 Comp. St. 1922, provides that the negotiable character of an instrument is not affected by a provision which "waives the benefit of any law intended for the advantage or protection of the obligor." The reason upon which the above decisions are predicated does not exist in cases like the case at bar. Therefore, under sections 5950-5954, Comp. St. 1922, a note, secured by a real estate mortgage which provides that the mortgagor shall pay the taxes levied against the mortgage or debt secured thereby, is negotiable, notwithstanding the fact that the note and mortgage are parts of a single transaction.

All parties were before the court. The court had jurisdiction of the subject-matter. Having found for appellee Peterson, it was the duty of the court to render judgment against Kuhn and in favor of Lulow for the amount due under the decree, as Kuhn did not object to this procedure.

The decree and judgment of the lower court is right, and is

AFFIRMED.

Weidman v. Barnes.

ANNA WEIDMAN, APPELLEE, V. HERBERT BARNES, DEFENDANT: FRED DYSON, APPELLANT.

FILED MAY 15, 1923. No. 22376.

1. **Principal and Agent:** CONVERSION: MEASURE OF DAMAGES. Where a party enters into a contract to purchase a farm and exchange merchandise in part payment, and acts through an agent, and is cheated and defrauded by the agent, and, when the fraud is discovered, refuses to receive the land, and repudiates the contract and sues the agent for conversion of the merchandise, which had been delivered, and it is beyond the power of the agent to return the property, the measure of damages is the fair market value of the merchandise at the time and place of the fraudulent conversion.
2. **Trover:** MEASURE OF DAMAGES: FAILURE TO INSTRUCT. Where there is a conflict in the evidence as to the value of the converted property, it is reversible error to fail to instruct the jury as to the true measure of damages.

APPEAL from the district court for Antelope county:
ANSON A. WELCH, JUDGE. *Reversed.*

J. F. Boyd, for appellant.

Kelsey & Rice and *Jackson & Rice*, *contra*.

Heard before MORRISSEY, C. J., DAY, LETTON and DEAN, JJ., BUTTON, District Judge.

BUTTON, District Judge.

Appellee entered into a contract with Herbert Barnes for the purchase of a farm for \$20,800, trading in thereon a stock of merchandise. Fred Dyson was agent for appellee. The price of the merchandise was inflated, of which fact appellee had knowledge. The merchandise was turned over to Barnes and appropriated by him. Appellee repudiated the contract and started action against Barnes and Dyson for the conversion of her goods. Appellee alleged that Dyson and Barnes entered into a conspiracy to cheat and defraud her out of her property and consummated the conspiracy. Appellee claimed the value and quality of the farm was misrepresented to her, and that she relied upon the representations as true. At the trial Barnes was discharged by the court, no appeal was taken, and he is

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not now before this court. Appellee recovered judgment against Dyson for \$4,973.60, a motion for a new trial was overruled, and Dyson appealed to this court.

The court instructed the jury that the measure of damages was the difference in the contract price, \$20,800, and the reasonable market value of the land on October 30, 1920, but not exceeding the damage claimed, \$6,000. This presents the only question before this court, and is: Was this instruction a correct application of the law under the pleadings and proof? We think not. Appellee did not accept the farm and sue for the difference in the contract price and the reasonable value of the land on October 30, 1920. She repudiated the contract and sued for the conversion of her goods. The measure of damage was the reasonable market value of the goods at the time and place of the conversion.

What appellee could have done for herself, she could do through an agent. If she had traded with Barnes herself, without the intervention of an agent, her damage would have been as above. She might have concluded in her own mind that she must have a certain price for her goods; but when she consented to a trade she took chances. She did likewise when she permitted her agent to trade for her. The court found for Barnes, and must have held there was no conspiracy between Barnes and Dyson. Therefore, the basis of appellee's recovery, under the petition, was the fraud of Dyson. What did Dyson defraud her out of? Manifestly her goods. She might have told him not to accept less than a certain price for her goods; but, when she permitted him to inflate the value of the goods for the purpose of trade and became a party to the trade herself, she placed herself in the same position as though she had traded with Barnes herself, and he had defrauded her. If Dyson defrauded her by false statement and deception, he is liable for what he took from her, and, since the goods are not capable of return, her damage is the value of the goods at the time and place of the conversion.

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Where a party enters into a contract to exchange merchandise for land, and acts through an agent, and is cheated and defrauded by the agent, and, when the fraud is discovered, repudiates the contract and sues the agent for conversion, and it is beyond the power of the agent to return the property, the measure of damages is the fair market value of the merchandise at the time and place of the fraudulent conversion. *Baker v. Thomas*, 102 Neb. 401. And where there is a conflict of evidence on a material issue, it is error not to submit the question to the jury. *Larsen v. Savidge*, 103 Neb. 79; *Fox v. Scandinavian Mutual Aid Ass'n*, 103 Neb. 117.

The giving of the instruction, adopting a wrong measure of damage, where the evidence was conflicting as to the value of the converted property, was reversible error.

REVERSED AND REMANDED.

The following opinion on motion for leave to remit was filed February 2, 1924. *Motion allowed.*

Appeal: REMITTITUR. When a remittitur will obviate an error resulting from an erroneous charge on the measure of damages, such remittitur, in the absence of other errors, may be accepted and the judgment affirmed, when the amount to be remitted is determinable from the evidence.

PER CURIAM.

In our opinion in this case reported, *ante*, p. 377, the judgment of the lower court was reversed and the cause remanded for further proceedings upon the sole ground that the jury were improperly instructed as to the measure of damages. We held that, the action being one in rescission, the measure of plaintiff's damages was the reasonable value of the stock of goods which the plaintiff turned over to the defendant in the trade.

The testimony on behalf of the plaintiff tended to show that the value of the stock was from \$5,000 to \$6,000. The lowest value on the stock and fixtures placed by defendant Dyson was \$1,750 on the stock, and \$800 on the fixtures, making a total of \$2,550. One of defendant's witnesses placed the value of the stock at \$1,500, but considered himself incompetent to testify

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as to the value of the fixtures. Taking this witness' value of the stock at \$1,500, and defendant Dyson's value of the fixtures at \$800, gives a total value of \$2,300. This was the lowest possible valuation of the stock and fixtures. Upon the trial the plaintiff recovered a judgment for \$4,973.60.

After our opinion was handed down, the plaintiff filed a motion indicating that, rather than to go to the expense of a new trial, she is willing to file a remittitur from the judgment so that the judgment will equal the value of the stock and fixtures as fixed by the defendant and his witnesses.

As the issue of fraud was determined by the jury in favor of the plaintiff under proper instructions, we can see no objection in allowing the plaintiff to accept the lowest possible verdict which the evidence would warrant, rather than to go to the expense of trying again all of the issues.

In *Mullins Lumber Co. v. Williamson & Brown Land & Lumber Co.*, 255 Fed. 645, it is held: "Where a jury by its verdict has settled all issues in favor of plaintiff, but because of an erroneous instruction may have awarded excessive damages, an appellate court may properly permit the judgment to stand on remission by plaintiff of all above the lowest amount the evidence would warrant."

If plaintiff, within twenty days, shall file a remittitur of \$2,673.60, the judgment of the district court will be affirmed; otherwise reversed.

AFFIRMED ON CONDITION.

ABRAHAM KATSKEE, APPELLANT, V. CITY OF OMAHA,
APPELLEE.

FILED MAY 15, 1923. No. 22383.

1. **Negligence:** PROXIMATE CAUSE: PROOF. Where two or more possible sources exist which may have produced an injury to property, and a party alleges an injury and damage to his property growing out of the alleged negligence of another, and the evidence is prin-

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cipally circumstantial, the party so complaining must prove, by a preponderance of all the evidence, that the negligence alleged was the proximate cause of the injury and damage, to the exclusion of all other present possible causes, or fail in his action.

2. **Evidence:** **EXPERT OPINION:** **FOUNDATION.** A foundation, qualifying a witness to testify that an injury to property was not caused from a particular source, is insufficient to qualify such witness to give an opinion, as an expert, as to the real cause.

APPEAL from the district court for Douglas county:
JAMES M. FITZGERALD, JUDGE. *Affirmed.*

E. R. Leigh, for appellant.

Dana B. Van Dusen and *John F. Moriarty*, *contra*.

Heard before **MORRISSEY, C. J., DAY, LETTON** and **DEAN, JJ., BUTTON**, District Judge.

BUTTON, District Judge.

Appellant was the owner of a building in Albright's Annex in Omaha, Nebraska, and in the year 1917, and for several years prior, had conducted a general merchandise business therein. About 40 or 50 feet northeast of appellant's property was a natural watercourse, known as Stock-Yards creek. To the south of appellant's property, and some 40 or 50 feet from the rear of his building, was another creek. In 1916 the city of Omaha constructed a sewer which was intended to take care of the waters from the Stock-Yards creek, and the city removed a bridge over this creek, near appellants building, and filled in the creek. Appellant claimed this fill caused the waters in Stock-Yards creek to back up near his property, and in time there was a seepage through into his basement and his building and goods were damaged, and claimed the proximate cause was the negligence of the city in filling up this natural watercourse.

The evidence was very unsatisfactory and uncertain and entirely circumstantial as to the proximate cause of the injury. The testimony showed the presence of other standing water near the building and the presence of

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the other creek, which always contained water, for which the city was in no way responsible. So far as the evidence was concerned, it was just as likely that the water in the basement came from one of these other sources, for which the city was not liable. The court directed a verdict for the defendant, and appellant has brought the case to this court.

It is now contended (1) that the evidence was sufficient to have taken the case to the jury, and that the court erred in directing a verdict; and (2) that the court erred in excluding the opinion of a witness who would have said the waters from the Stock-Yards creek caused the damage.

The overruling of the motion for a new trial is not assigned as error, and possibly this waives the other two alleged errors; however, we shall consider the other two grounds.

The burden was upon the one claiming damage for an injury, to have proved, by a preponderance of all the evidence, that the negligence alleged was the proximate cause. It was not sufficient to have proved a possible cause, nor even a probable cause, the preponderance of the evidence must have pointed to the cause alleged as the proximate one, to the exclusion of other present and equally possible sources of the injury complained of. *Union P. R. Co. v. Fickenschner*, 74 Neb. 497; *Blid v. Chicago & N. W. R. Co.*, 89 Neb. 689; *Ashbach v. Chicago, B. & Q. R. Co.*, 74 Ia. 248; *Neal v. Chicago, R. I. & P. R. Co.*, 129 Ia. 5; *Eisentrager v. Great Northern R. Co.*, 178 Ia. 713.

So far as expert testimony was concerned the foundation was wholly insufficient. The witness tendered was shown to be an expert on locating leaks in pipes and testified he found none in the water pipes in the basement. As to whether the water in the basement came from any other particular source, no foundation was laid to qualify the witness to state. No authorities are

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cited in support of the alleged error, and we will not pursue the subject further.

The judgment of the trial court is right, and is

AFFIRMED.

BERTHA PREBLE, ADMINISTRATRIX, APPELLEE, v. UNION STOCK YARDS COMPANY, APPELLANT.

FILED MAY 15, 1923. No. 22285.

1. **Master and Servant: INJURY TO SERVANT: LAST CLEAR CHANCE.** Where an engineer sees a brakeman on the side ladder of a car on a moving train in a switch-yard in a position that may become dangerous if the brakeman does not change his position, but the engineer knew that the brakeman was fully aware of the perilous situation he was approaching, and had ample time and a convenient way to avoid the danger by stepping to the end ladder or getting on top of the car, and the engineer believed, and was justified in believing, that the brakeman would so protect himself, it was not the duty of the engineer to keep the brakeman under observation, and stop the train before the point of danger was reached. In such a situation the doctrine of "the last clear chance" is not applicable.
2. ———: **CARE REQUIRED.** When there are two methods provided to accomplish the same act, one safe and the other unsafe, and both methods are known to the employee, he is bound to use the safe method.
3. ———: **FEDERAL EMPLOYERS' LIABILITY ACT: CONSTRUCTION.** The federal court interpretation of the federal employers' liability act must prevail over any state law or rule of interpretation of a state court.
4. ———: ———: **ASSUMPTION OF RISK.** In a case arising under the federal employers' liability act, the statute of Nebraska, section 8833, Comp. St. 1922, which abrogates the assumption of risk of an employee of a railroad company, where the railroad company is guilty of negligence, is not applicable, and the federal law as to assumption of risk is controlling on the state courts.
5. ———: ———: ———: **BAR.** "Assumption of risk is a bar to the action, in a case governed by the federal employers' liability act, and does not, like contributory negligence, operate merely in reduction of damages." *Pryor v. Williams*, 254 U. S. 43.
6. ———: ———: **INJURY TO SERVANT: ASSUMPTION OF RISK.** An experienced brakeman who had full knowledge of a dangerous

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construction of side-tracks in a railroad company's switch-yard, and the hazard incident to service in such yards, and continued his employment without objection, assumed the risk incident to his employment in a case arising under the federal employers' liability act.

APPEAL from the district court for Douglas county:
CARROLL O. STAUFFER, JUDGE. *Reversed.*

Brown, Baxter & Van Dusen and R. R. Ryan, for appellant.

Gray & Brumbaugh and John M. Macfarland, contra.

Heard before MORRISSEY, C. J., ROSE, LETTON, ALDRICH, DEAN and DAY, JJ., RAPER, District Judge.

RAPER, District Judge.

This is an action by an administratrix to recover damages for negligence in causing the death of her alleged husband, Howard Preble, and is based upon the federal employers' liability act.

The petition alleges that defendant is a common carrier engaged in interstate commerce, and that defendant was negligent in the following particulars: (1) That the engine used by defendant at time of the accident was not properly equipped with a headlight, as required by rule 131 of the interstate commerce commission; (2) that the defendant maintained and operated tracks and switches parallel with each other under a long shed, so close together that, when cars were run on said tracks opposite each other, it was a dangerous place for employees; (3) that the shed was dark and not properly lighted; and (4) that the engineer saw the deceased in a place of danger and negligently failed to stop before the two freight cars came opposite each other. The defendant denies all the alleged negligence, pleads contributory negligence and assumption of risk, and denies plaintiff's marriage with the deceased. The cause was submitted to the jury, which returned a verdict for plaintiff, and judgment was entered thereon.

There is no dispute in the material facts pertinent to

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the condition of the tracks, and the lighting, and what took place at the time of the death of Howard Preble, who was employed by defendant as a switchman. Defendant's switch crew, consisting of the deceased, two other switchmen, the fireman, and engineer, went on duty at 4 p. m. of November 20, 1920. Their work was to take loaded cars from loading platforms, and replace them with empties, and were then engaged in interstate commerce. Defendant maintained a shed to cover the tracks between two loading docks. The sheds, about 16 car-lengths long, were lighted by 30 to 40 electric lights placed in the top. Under this shed between the two loading docks are 3 tracks running nearly parallel east and west, the north numbered 3, the center one numbered 4, and the other numbered 5. At a point 4 car-lengths from west end of shed from the south rail of track 3 to the north rail of track 4 is 5 feet and 9 inches, leaving a space between cars opposite each other on those tracks, as plaintiff computes, of about 9 inches. Between 6 and 7 o'clock deceased assisted in placing 4 cars on the west end of track 3. About 9 o'clock the crew had their engine and some cars east of the switch at east end of track 4. Deceased turned the switch to track 4, climbed to top of first car back of engine, and signaled engineer to go ahead, then deceased started to climb down the ladder on the side of the car. The deceased was about 200 feet from the stationary cars on track 3 when the engineer observed him at that time, and deceased being "in the clear," as the engineer expressed it, the engineer had no thought of danger, and then turned his face toward the west on the lookout for signals, and paid no further attention to deceased, as he supposed deceased would not remain on the side ladder until the cars on track 3 were reached. The engineer saw the car on track 3, before he was within 200 feet of it. The engine kept moving, and the engineer happened to look back when he had passed the first car on track 3, and saw deceased "rolling" between the cars, part of his body being above the roof of

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the cars. The crushing between the cars, or "rolling," as the railroad men termed it, fatally injured deceased. Howard Preble was an experienced switchman, and had worked for defendant in these yards for 8 or 9 months, and must have been fully aware of the construction of the tracks and the danger he would encounter if he stayed on the side ladder of the car until it reached the standing cars on track 3. All the cars had a side ladder and end ladder, and it was the custom of switchmen, when they were on moving cars liable to pass moving or standing cars on an adjoining track, to use the end ladder instead of the side ladder.

The allegations of negligence 1 and 3 are not sustained by plaintiff's own testimony, and the verdict cannot be upheld on either of the alleged acts.

On the question of liability on the last clear chance theory, it will be noticed from the statement of the facts that the engineman, when 200 feet from the cars on track 3, saw the deceased on the side ladder of the car behind the engine, and supposed and had the right to assume that deceased would not remain in that dangerous place, and, after having received the signal from deceased to go ahead, the engineer turned toward the front of the train to look for signals, as was his duty. There was no further duty resting on the engineer to keep his face toward the deceased, and watch him. The deceased knew the danger of remaining on the side ladder, and knew where the cars had been left on track 3. In *Robbins v. Pennsylvania Co.*, 245 Fed. 435, the court gives this rule: "The doctrine of 'last clear chance' takes account of the acts and omissions of both the person injured and the defendant, and applies only where the defendant has either actual notice or is fairly chargeable with notice of the peril of the person injured, and negligently fails to avoid the injury." The evidence does not establish negligence of the engineer, hence recovery cannot be based thereon.

The proximity of the tracks created a very dangerous

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place for the switchmen to work, and this ground of negligence is proved beyond question. The situation also discloses that deceased was fully aware of every element of danger connected with his work at the place, and never made complaint or objection thereto, and defendant contends that he voluntarily assumed the risks of the dangers necessarily inherent in his work there. It is the duty of the state courts to follow the interpretation of the federal courts as to the federal employers' liability act. *Bennett v. Atchison, T. & S. F. R. Co.*, 191 Ia. 1333. While our statute, section 8833, Comp. St. 1922, abrogates assumption of risk where the carrier is negligent, that statute cannot be applied in this case. *Pryor v. Williams*, 254 U. S. 43. That case also holds: "Assumption of risk is a bar to the action, in a case governed by the federal employers' liability act, and does not, like contributory negligence, operate merely in reduction of damages."

Under the federal employers liability act, if an employee knows of a defect and appreciates the risk that is attributable to it, then he assumes the risk, even though it arises from the master's breach of duty, if he continues in the employment without objection. 1 Roberts, Federal Liability of Carriers, secs. 558, 559.

The undisputed facts establish that deceased was an experienced switchman in full possession of his faculties, that he knew the dangerous proximity of the tracks, and that it was an unsafe place to be on the side ladder, and, under the circumstances, assumed the risk. Inasmuch as the cause must be reversed because of the matters above stated, it is unnecessary to advert to the question of the sufficiency of the evidence to prove a common-law marriage between plaintiff and deceased.

Cause reversed and remanded.

REVERSED.

FIRST STATE BANK OF CRETE, APPELLEE, V. SPENCER A. YOH0, APPELLANT.

FILED MAY 26, 1923. NO. 22364.

Appeal: SUFFICIENCY OF EVIDENCE. When on appeal the question

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presented is the sufficiency of the evidence to sustain the ruling of the trial court on a motion to dissolve an attachment, and from an examination of the whole record it is apparent that a finding other than that made by the trial court could not be sustained, the evidence will be held sufficient.

APPEAL from the district court for Saline county:
LEONARD W. COLBY, JUDGE. *Affirmed.*

Bartos & Bartos, for appellant.

Glenn N. Venrick and Cosgrave & Campbell, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and
GOOD, JJ., BEGLEY, District Judge.

MORRISSEY, C. J.

This action is founded upon promissory notes aggregating \$8,400. The notes were executed and delivered to plaintiff by defendant, who was engaged in the automobile and garage business. As security for the payment of the notes, defendant executed a chattel mortgage covering his stock of merchandise, equipment, etc., but the mortgage was withheld from record, and, under an agreement between the parties, defendant was authorized to continue his business and sell his stock; the proceeds from the sales, however, to be applied upon the notes. Forty days after the making of the notes, and before any of them had matured, plaintiff instituted proceedings in replevin to recover possession of the property covered by the chattel mortgage and still remaining in the possession of defendant, and instituted this proceeding by attachment to reach other property of defendant. The replevin proceedings are not before us, and we are dealing only with the proceedings had under the attachment.

Five separate grounds for the attachment were alleged, but the allegations that are material for this review are: That defendant was about to remove his property out of the jurisdiction of the court with intent to defraud his creditors; that he was about to convert his property into money for the purpose of placing it beyond the reach of his creditors; that he had property, money and rights in

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action which he concealed; and that he had assigned, removed or disposed of or was about to dispose of his property or a part thereof with an intent to defraud his creditors.

Defendant filed a motion to dissolve the attachment; the grounds therefor being that the statements in the affidavits for attachment were untrue. The motion was overruled and judgment in favor of plaintiff was entered upon the notes. Defendant has appealed.

Although presented in several ways, there is but one question for consideration, namely, the sufficiency of the evidence to sustain the attachment. It is purely a question of fact. At the time of executing the notes defendant furnished plaintiff a property statement in which he alleged that the fair and reasonable value of his chattel property was \$16,947.75, and that his unpaid bills did not exceed \$600. Within the succeeding 40 days he sold the greater part of his stock of goods, office fixtures and garage equipment at wholesale prices, or less, until at the time plaintiff instituted proceedings the goods and equipment remaining, when put upon the market and sold, brought only \$3,779.27.

It would needlessly incumber the reports to set out in detail a statement of defendant's transactions. The method of making the sales and the prices realized show conclusively that the sales were not made in the usual course of business. The sales of the office fixtures and shop equipment strongly indicate a determination on the part of defendant to sell not only the merchandise, but to close out the business. It is conceded that the proceeds from the sales were not applied upon the notes, and defendant undertakes to justify his conduct in this regard by saying that he had been advised by his brother-in-law to first pay his unsecured indebtedness. In addition to making the sales heretofore mentioned, defendant also executed on the very day the attachment was procured a note and mortgage in favor of his wife for \$6,500 covering the only real estate he then owned. De-

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fendant claims that the note and mortgage were executed after the attachment issued, but from all the circumstances we cannot escape the conclusion that they were executed in anticipation of the attachment proceedings. It may be worthy of mention also that improvements had recently been made upon this real estate with the money realized from the property on which plaintiff held a mortgage, and that when defendant submitted his property statement to plaintiff he made no mention of any indebtedness due to his wife.

When the whole record is considered, the conclusion is irresistible that the allegations of the affidavit in attachment are true. No finding other than that made by the trial judge could be sustained, and the judgment is

AFFIRMED.

MARGARET N. CHRISTOFFERSEN, APPELLEE, V. CHARLES WEIR, APPELLANT.

FILED MAY 26, 1923. No. 22389.

1. **Appeal:** **CONFLICTING EVIDENCE.** In a personal injury action where the evidence of physicians called by the respective parties is conflicting, in respect of injuries sustained, but there is sufficient competent evidence to support the verdict, it will not be disturbed on appeal.
2. ———: **INSTRUCTIONS: PRESUMPTION.** Where the court instructs on comparative negligence, it will be presumed that the jury took into account the contributory negligence of plaintiff, if any, and considered it in arriving at its verdict.
3. **New Trial:** **NEWLY DISCOVERED EVIDENCE.** Where an application for a new trial is made on account of alleged newly discovered evidence and the showing discloses that the evidence, if produced, would be cumulative in substance and effect, error cannot be predicated upon a denial of the application.
4. **Municipal Corporations:** **USE OF STREETS.** The right of a pedestrian to the lawful use of the crosswalks in a city or village is in all respects equal to that of a person driving a motor-propelled vehicle thereon. Comp. St. 1922, sec. 8392.
5. ———: ———: **CARE REQUIRED.** It is the duty of the driver of an automobile to exercise reasonable care in its operation, and where

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pedestrians are numerous and traffic is congested, the degree of care required must be commensurate with the danger reasonably to be anticipated. Comp. St. 1922, sec. 8392.

6. ———: ———: WARNING BY AUTOMOBILISTS. Section 8395, Comp. St. 1922, contemplates, not only the installation of warning devices on motor-propelled vehicles, but that they shall as well be used opportunely by the drivers of such vehicles to apprise pedestrians and other travelers of the approach of an oncoming car.
7. **Appeal:** REMITTITUR. "Where plaintiff in a personal injury action recovers a verdict and the trial court directs a remittitur and the defendant appeals, this court will on request of plaintiff, in a proper case, set aside such remittitur either in whole or in part as the evidence may warrant." *Miller v. Central Taxi Co.*, ante p. 306.

APPEAL from the district court for Douglas county.

L. B. DAY, JUDGE. *Affirmed as modified.*

Kelso A. Morgan, for appellant.

Rosewater & Mecham, contra.

Heard before MORRISSEY, C. J., LETTON, DAY and DEAN, JJ., BUTTON, District Judge.

DEAN, J.

This suit was brought to recover damages for personal injuries sustained by reason of defendant's alleged negligence in driving his car against plaintiff while she was crossing Farnam street at Fourteenth street in Omaha. She recovered a verdict for \$1,200. A motion for a new trial was overruled on condition that plaintiff file a remittitur for \$350. Upon compliance with the court's requirement, judgment was rendered for \$850, and defendant appealed.

Briefly plaintiff's account of the accident is that at about 6:30 or 7 o'clock in the evening of December 19, 1920, she left the north front door of the Paxton hotel pharmacy at the southwest corner of Fourteenth and Farnam streets. Fourteenth street runs north and south; Farnam east and west. From her evidence it appears that she went directly north on the crosswalk to take a south-bound Council Bluffs trolley

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car at Fourteenth and Farnam streets; that when she reached a point about six feet north of the car tracks on Farnam street defendant's car, which was being driven close to the curb, turned west from Fourteenth street into Farnam street and knocked her down; that the left front wheel of defendant's car pinned both of her feet to the pavement and had to be backed off before she could get up, the wheel passing diagonally over her right foot a little above the instep; that after the accident she walked on crutches for three weeks, and the injuries subsequently caused her to limp and at all times caused "great pain and mental anguish and loss of sleep." She also testified that the accident permanently impaired her health and that thereafter she was compelled to have medical treatment almost continuously at an expense approximating \$100. It appears from plaintiff's evidence and defendant's admission that he sounded no signal and gave no warning of the approach of his car.

Defendant's version in substance is that on the night of the accident, at about 7 o'clock, he turned his Reo touring car from Fourteenth street into Farnam street at a speed of less than five miles an hour; that he was accompanied by his wife and her sister, Miss Tobin, all three occupying the front seat; that the headlights were turned on and the car was without curtains and there was nothing to obstruct his view; that he did not see plaintiff until she was opposite his left front wheel and that he stopped within six inches; that he immediately stepped out of the car and, at his suggestion, she was taken in his car to a physician at the Paxton hotel, where, on arrival, he told the doctor that plaintiff lost her balance and that her foot slipped under the front wheel of his car, but that the car did not strike her. Upon examination the doctor bound up her foot with adhesive tape. He testified that he did not see plaintiff running as she approached his car. Ten days after the accident plaintiff called defendant up, according to his evidence, and told him that was the first

day she had been able to put her injured foot to the floor, and that he again told her she should have a doctor.

Defendant's wife testified: "The instant the car stopped he (defendant) jumped out, the instant that I screamed, she was going down at the scream. Just at that instant a couple people jumped up there and some helped to pick her, and Mr. Weir backed up a few inches." She also testified that Mr. Weir told the doctor in the Paxton hotel that the front wheel of his car was on plaintiff's foot. When the doctor bound plaintiff's foot she said he advised her "to stay off of it for a few days, it might be sore."

Mrs. Weir's sister testified that she did not see plaintiff until the car turned the corner, and then she made a leap and fell back, and when they arrived at the hotel Mr. Weir and another man took plaintiff by the arm and helped her up the steps.

Mr. Cosgrove, a bystander, testified that he heard a lady cry out, and that he and another man picked plaintiff up and helped to put her in defendant's car; that when he came up to her she was lying on her back in the street on the intersection of the sidewalk.

The only physician who testified on the part of plaintiff was the one who was first called to attend her about three weeks after the accident. He testified that he found she had been hurt with some kind of a crushing or pressing injury to the foot which resulted in crepitus; that her right ankle joint was much swollen and would bear weight with great difficulty and was very tender and painful on motion. He took an X-ray and found a fracture of one of the long bones of the ankle and of the foot, and sprained ligaments, and that the injury was permanent in that plaintiff would always limp; that the arch of her foot went down as soon as she commenced to bear weight on it; that she had formerly been treated for tuberculosis and that this tendency delays healing and tends to localize tuberculosis in an injured bone. He said that his treat-

ment consisted of rest, the use of crutches and adhesive plaster strips.

Three doctors were called on the part of defendant. The doctor who made the examination at the Paxton hotel testified that plaintiff could not put her foot down without pain, but that he found no fracture or deformity in any of the bones, and that he bound her foot with adhesive tape at the time. He further testified that to sprain the ankle or to fracture the small bones of the foot a "terrific force" is required. That the fracture of a bone of a tubercular person would heal more slowly than that of a person in normal health was conceded.

Another, who made an X-ray examination of the injured foot the day before the trial, testified that no fracture was disclosed, and that while there might be a minute fracture that sometimes heals without callus his X-rays gave no evidence of it; that the arch of her foot was in fairly average position; that he could not say she had a bad arch, and that he found nothing in the bones to cause lameness and that she had a good average foot. The doctor's conclusion was that there was nothing wrong with the bones, but he said that did not prove that there was nothing wrong with the foot.

The third physician called by defendant corroborated the other two in the main, but added that if plaintiff's foot or ankle was run over by an automobile it would be possible for the ligaments to become torn or lacerated in some degree, and that torn ligaments will sometimes occasion more pain and more swelling than a bone fracture, but that the X-ray does not disclose ligament injuries as it does bone injuries. He testified that on examination the day before the trial plaintiff complained of pain upon severe rotation of the arch.

Defendant complains of instruction No. 6, which follows: "Certain witnesses (physicians and surgeons) have been called who testified as expert witnesses. You are not bound to take the opinions of experts as binding upon you, but only to aid you in coming to a proper conclusion, their

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testimony being received as that of persons who are learned by reason of extra investigation and study along lines not of general knowledge, and the conclusion of such persons may be of value. You may adopt, or not, their conclusions, according to your own best judgment, giving in each instance such weight as you think should be given under all the facts and circumstances of the case."

• The argument in the brief is that the evidence of the doctor who testified on the part of plaintiff conflicts with the evidence of the doctors called by defendant, and that "the evidence given by all the doctors was not so much as experts, but rather as men skilled in their profession who had made an actual examination of the plaintiff and were telling the jury the result of their examination."

True, the physicians differed in respect of plaintiff's injuries, their permanent nature and the like. It is obvious that the jury could not accept both of the conflicting versions of medical evidence. They chose between the two. It is elementary that where there is competent evidence to support the verdict, as appears in the present case, it will not be disturbed on appeal. *Penhansky v. Drake Realty Construction Co.*, 109 Neb. 120. Reversible error does not appear in the instruction.

It appears that plaintiff was 26 when she was injured, and that she lived at home with her parents. She testified that, before the injury, she did all the housework because her mother was aged and feeble and unable to work. For her services she received her board, lodging and clothing and about \$15 or \$20 a month. Since the injury she has been unable to do any of the housework. Clearly the amount of damages allowed by the jury, in view of plaintiff's expenses for medical treatment, and in view of the record generally, is not excessive.

The court properly instructed the jury on the question of comparative negligence, so that if there was contributory negligence on the part of plaintiff, as counsel insist, the jury took it into account in computing the amount of the recovery.

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Defendant complains because the court denied his application for a new trial on the ground of newly discovered evidence. The court did not err in its ruling. The showing submitted by defendant discloses that the evidence of the proposed witness would have been cumulative in substance and effect.

The right of a pedestrian to the lawful use of the crosswalks in a city or village is in all respects equal to that of a person driving a motor-propelled vehicle. The statute provides that, "within any city or village no motor vehicle shall be operated at a rate of speed greater than is reasonable and proper, having regard for the traffic and use of the road and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person." Comp. St. 1922, sec. 8392.

That an automobile driver is required, as a matter of law, to exercise reasonable precaution and care in its operation is firmly established. That defendant did not see plaintiff is no excuse for running her down with his car. From his own evidence and that of his wife it appears that the car lights were turned on and the side curtains were removed and there was nothing to obstruct the vision. Under such circumstances defendant should have seen plaintiff in time to stop his car before the collision. It was his duty to see her, and if he had exercised reasonable precaution he would have seen her. *Mares v. Chaloupka*, ante, p. 199. Defendant was driving on one of the main thoroughfares of Omaha at the time, where the traffic is dense, and at a point where unusual care is required in the management of an automobile. When he first saw plaintiff he testified that he stopped his car within six inches. But it was too late. The wheel was then on plaintiff's foot, as defendant himself informed one of the physicians. The injury was then inflicted and the damage was done beyond recall.

Defendant admits that he did not sound the horn or give any warning when he turned into Farnam street, which is one of the busiest thoroughfares in the city. On

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this point defendant argues that there is no statutory requirement that any warning shall be given upon approaching or entering an intersection. Section 8395, Comp. St. 1922, provides: "Every motor vehicle while in use on public highways shall be provided with good and sufficient brakes and also with suitable bell, horn or other signal." The statute is not meaningless. It was enacted for a purpose. Of course, it contemplates the installation of warning devices to be used to caution pedestrians and other travelers on the highway who may be in the path of an approaching car. Otherwise the provisions would be a mockery. But no warning was given, and a car, weighing almost 3,000 pounds, was negligently driven against and upon the person of plaintiff.

With respect to the remittitur. We are unable to find a substantial basis in the evidence which will support the trial court's requirement that a remittitur be filed by plaintiff in the sum of \$350, as a condition precedent to the overruling of defendant's motion for a new trial. No need to repeat or to emphasize the evidence on this point; nor is there any need for extended argument. The record speaks for itself. Mention need only be made of the fallen arch and plaintiff's consequent halting walk, and the evidence which tends to prove that her injury is permanent, and also that which has to do with plaintiff's decreased earning power. This subject is briefly discussed in a very recent case. *Miller v. Central Taxi Co.*, ante, p. 306.

On plaintiff's application, and for the reasons herein advanced, it is ordered that the required remittitur be vacated and that judgment be entered for plaintiff for \$1,200 as of the date of the rendition of the judgment in the district court.

Other assignments of alleged error have been pointed out by counsel which we have considered, but, in view of our decision, we do not find it necessary to discuss.

As herein modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

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EDWARD WALKER, APPELLANT, v. NICHOLAS McCABE ET AL.,
APPELLEES.

FILED MAY 26, 1923. No. 22393.

Trial: SPECIAL FINDINGS. "A special finding controls a general verdict, and when inconsistent with the general verdict it is the duty of the court to render judgment accordingly." *Norfolk Beet-Sugar Co. v. Preuner*, 55 Neb. 656.

APPEAL from the district court for Lincoln county:
J. LEONARD TEWELL, JUDGE. *Affirmed*.

William E. Shuman, for appellant.

Halligan, Beatty & Halligan and *George N. Gibbs*,
contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and DEAN,
JJ., BEGLEY, District Judge.

DEAN, J.

Since this action was appealed to this court Dr. McCabe, one of the defendants, died. Subsequently the action was revived here in the name of Mrs. Mary McCabe, his widow, and she, as his executrix, was made a party defendant.

Plaintiff sued to recover \$2,072 from defendants for removing flood-waters from the basement of the McCabe hotel at North Platte. The jury brought in the following general verdict:

"We, the jury in this case, being duly impaneled and sworn, do find and say that we find for the plaintiff and against both defendants jointly in the sum of \$1,059.95, interest \$49.44, \$1,109.39, and against the defendant Claud Weingand, alone, in the additional sum of \$53.75, interest, \$4.76, \$58.51, and we fix the amount of plaintiff's recovery against said defendants in said sum."

Special findings in the form of interrogatories were submitted to the jury on motion of plaintiff. The interrogatories and the answers thereto follow:

"1. What do you find to be the total reasonable value of the services performed by the plaintiff in pumping the water out of the basement of the hotel McCabe during the period extending from April 14, 1920, to May 28, 1920,

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both dates inclusive? Answer, \$1,113.70 without interest added.

"2. In how much, if anything, is the defendant, Nicholas McCabe, indebted to the plaintiff on account of the water being pumped out of said basement? Answer, \$529.97, interest \$24.72.

"3. How much, if anything, is the defendant, Claud Weingand, indebted to the plaintiff on account of the water being pumped out of said basement? Answer, \$583.73, interest \$29.48."

McCabe moved that judgment be entered upon the special findings and that the costs be taxed equally against defendants. The motion was sustained and pursuant thereto judgment was rendered against McCabe for \$554.69, with interest, and against Weingand for \$613.21, with interest, the costs being taxed equally against defendants. Plaintiff appealed.

The condition of the subsoil at North Platte, with respect to water rising to the surface at times, is material here and is briefly explained in plaintiff's brief. He says:

"North Platte is situated in the valley between the North and South Platte rivers, which join a very few miles east of the city. This condition causes water to come up under the surface of the ground and enter into the basements. The situation is very annoying, and often sewage comes up into the basements also."

It appears that, when the lease was entered into, the peculiar condition of the soil, with respect to seepage, which prevails when the rainfall is excessive was contemplated by McCabe and Weingand, as shown by this excerpt from the lease, which was in full force and effect at the time of the controversy herein. The excerpt follows:

"It is further understood and agreed that the party of the second part (Weingand) is conversant with the water conditions in the ground upon which North Platte is situated, and that he assumes all risk of water in the cellar and basement of said hotel building and shall not

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hold first party (McCabe) liable for any damage arising by reason of water in said basement. It is further agreed that upon the completion of said building, in accordance with the plans and specifications heretofore referred to, that the said second party shall make all repairs necessary to be done upon the inside of said hotel building and the said first party will do the repairing necessary to be done on the outside of said building, such as repairing the roof; that said first party shall have the water and sewer connections in good condition when said hotel building is completed and turned over to said second party, and said second party shall keep the same in good condition, and pay necessary expenses for repairs in so doing."

Dr. McCabe, during all of the time material to this inquiry, was the owner of the McCabe hotel building. Weingand was his tenant under a ten-year lease. The hotel has 68 rooms, and a basement wherein there is a steam heating plant, a hot water heater, and an electric motor to operate a passenger elevator. April 14, 1920, a heavy rainfall in the North Platte vicinity caused the water to rise in the hotel basement and extinguish the fires and otherwise discommode the tenant and his guests. Weingand was at Omaha serving on a federal jury at the time, and his wife took the matter up with Dr. McCabe. When the action was tried Mr. Weingand was in business at Los Angeles and the deposition of Mrs. Weingand was taken in that city.

On the direct examination Mrs. Weingand testified that on the morning of the flood she met Dr. McCabe in front of the hotel and told him "about the water and how the fire was, and I said I do not know what to do." To which the doctor replied, "We will have to get Walker (plaintiff) and pump it out." and that her recollection was that Walker began working the same day or the next.

Defendant McCabe testified in substance that he relied upon the conditions in the lease with respect to taking the water out of the basement, and that he had no conversation with plaintiff after he began work until some-

time early in May when plaintiff asked him for \$200, and that he then told him that he did not owe him anything. The witness further testified that he reminded plaintiff that Weingand had paid him the year before for taking the water out of the basement and that the lease protected him (McCabe), and that plaintiff would have to collect the money from Weingand or quit work. On another occasion it appears from McCabe's evidence plaintiff again asked him to pay and that he told him that he had to protect himself. Shortly thereafter this suit was commenced. On the cross-examination the doctor denied that he said to Mrs. Weingand, "We will have to get Walker and pump it out," but that he said, "You will have to get Walker." He also testified that Weingand paid plaintiff for pumping the water out of the basement the previous year under the present lease. It further appears from a disinterested witness that plaintiff removed his pump from the hotel the morning of June 1, 1920.

Plaintiff himself testified that in the fore part of May, 1920, after he had pumped about a month, he called on Dr. McCabe, and when he asked him for money the doctor said to him in substance that Weingand paid him for pumping the water out last year and that he must pay for the work this year, and that the doctor further informed him that he was protected by a clause in his lease.

The court instructed the jury *inter alia*, instruction No. 9: "In this case, it is admitted by all parties that the defendant McCabe owned the hotel building and the defendant Weingand was operating the hotel, during the time the plaintiff was pumping the water from the basement. If under the evidence you find that the defendant McCabe asked the plaintiff to bring his equipment and pump the water from the basement; that the plaintiff pursuant to said request, without knowledge of the terms of the lease between defendants McCabe and Weingand, rendered the services requested, without any talk or agreement as to consideration therefor, then the law implies the

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agreement on the defendant McCabe's part to pay the reasonable value of the services rendered. If you further find from the evidence that, after the plaintiff Walker began the work of pumping out the water from the hotel basement, plaintiff presented a bill to the defendant McCabe, and the defendant McCabe then and at that time told the plaintiff that he was not liable for the work being then done by plaintiff and that he would have to go to defendant Weingand for his compensation, then I charge you that the defendant McCabe is not liable for any work done or expense made thereafter by plaintiff in pumping water out of the basement of said hotel and can be held only up to the date the defendant McCabe refused to pay for his services."

In instruction No. 5 the court further instructed the jury: "If you find that plaintiff was employed by both the defendants McCabe and Weingand, then you will find and determine under the evidence what the services rendered by the plaintiff were reasonably worth. The amount so found, together with interest on the amount found due, at the rate of seven per cent. per annum from May 28, 1920, to this date, will be the amount of your verdict in plaintiff's favor."

The bill rendered by plaintiff for services shows that he began work April 14, 1920, and that he quit work May 28 following, so that it may fairly be said to appear that plaintiff performed about one-half of the work when he presented a bill to Dr. McCabe and the doctor refused payment.

Plaintiff's argument that judgment should have been rendered by the trial court on the general verdict instead of on the special findings, which are inconsistent therewith, is not persuasive. Under the evidence and the instructions it appears from the special findings that the jury must have concluded that each of the parties was liable for approximately one-half of the amount which the jury allowed for plaintiff's services. In any case it clearly appears that the special findings are inconsistent with the

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general verdict and that they are supported by the evidence and respond to the instructions of the court.

The statute provides. "When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly." Comp. St. 1922, sec. 8803.

In *Norfolk Beet-Sugar Co. v. Preuner*, 55 Neb. 656, we held: "A special finding controls a general verdict, and when inconsistent with the general verdict it is the duty of the court to render judgment accordingly."

We conclude that the trial court did not err in refusing to grant a new trial. The judgment is therefore

AFFIRMED.

JAMES C. FLYNN ET AL., APPELLEES, V. ROYAL NEIGHBORS
OF AMERICA, APPELLANT.

FILED MAY 26, 1923. No. 22439.

Insurance: DELIVERY OF POLICY. On the facts stated in the opinion, *held* that there was a delivery of the benefit certificate to the insured in her lifetime and while she was in good health.

APPEAL from the district court for Dodge county:
A. M. POST, JUDGE. *Affirmed.*

Benjamin D. Smith and Nelson C. Pratt, for appellant.

Joseph E. Daly, *contra.*

Heard before MORRISSEY, C. J., ALDRICH and DAY, JJ.,
COLBY and REDICK, District Judges.

ALDRICH, J.

This is an action at law brought by plaintiffs, James C. Flynn and Franklin J. Flynn, a minor, by James C. Flynn, his father and next friend, against the defendant, Royal Neighbors of America, a corporation, having its home office at Rock Island, Illinois, to recover the sum of \$2,000 alleged to be due on a benefit certificate issued by the defendant company through Silver Leaf Camp, No. 390, located at Fremont, Nebraska. At the close of the testimony the trial court directed a verdict in favor

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of plaintiffs. Judgment was rendered in the sum of \$2,367, with interest at the rate of 7 per cent. per annum from September 13, 1921, until paid; and, in addition, the sum of \$125 was allowed plaintiffs as attorney fees and taxed as a part of the costs. Motion for new trial was overruled, and defendant appeals.

Helen G. Flynn, (now deceased) had, in years gone by, held a benefit certificate issued by defendant through Camp No. 386, at O'Neill, Nebraska. On September, 21, 1918, she made application for reinstatement or new membership and benefits in the society through Silver Leaf Camp, No. 390, and for a benefit certificate in the sum of \$2,000 payable as follows: \$1,000 to James C. Flynn, her husband, and \$1,000 to Franklin J. Flynn, her son. The camp officers at Fremont recommended the applicant for adoption; on September 27, 1918, she was examined by the camp physician and approved; on October 2, 1918, the application was approved by the supreme physician and recommendation made that a benefit certificate be issued. Helen G. Flynn took the secret and ceremonial work on October 4, 1918, and was initiated and adopted into the order by the officers of Silver Leaf Camp, No. 390. The benefit certificate, No. 487,228, dated at the city of Rock Island, Illinois, on October 31, 1918, was duly issued and forwarded to the recorder of Silver Leaf Camp, No. 390, but was never manually delivered to Helen G. Flynn, who died November 29, 1918, from the effects of an anesthetic administered in a hospital at Rochester, Minnesota, where she underwent an operation for goiter. Defendant's tender of the fees and charges paid by the applicant was refused by plaintiffs, who instituted this action claiming that there was a delivery in law of the benefit certificate to Helen G. Flynn in her lifetime, and that they were entitled to the benefits. Defendants claimed, in substance, as a defense, that (1) Helen G. Flynn never became a member of the society, and (2) the contract of indemnity for which application was made by Helen G. Flynn in favor of plain-

tiffs was never completed, that is, that there was no delivery of the certificate.

The record shows that Helen G. Flynn had gone through all the ceremonial processes and had paid all dues and fees necessary to become a member and receive the rights and benefits of the order. Hence, as a matter of fact, she was a member of the society and appellant's contentions to the contrary are without merit.

The next and most important question is: Was the delivery of the policy to a local officer of the lodge a delivery to the applicant? It has been so held by this court in the case of *Tracy v. Supreme Court of Honor*, 4 Neb. (Unof.) 189. In other words, it has been held in a case like the instant one that "A member of a fraternal society had fully complied with the rules and regulations thereof and that the delivery of his certificate by such order, to an officer of the subordinate lodge of which he is a member, was a delivery to him." Such is the rule of law laid down in Nebraska. We believe it is good law and sound practical sense. Notwithstanding that the by-laws in question provide that the policy shall not become effective until there is a manual delivery of it and a receipt for the certificate, we are of the view that the facts of this case are controlled by that decision. In other words, when the deceased insured had complied with all the rules and regulations to become a member, and the society, or supreme lodge, had recognized this to the extent of issuing the benefit certificate and mailing it to an officer of the subordinate lodge of which applicant was a member, we say, as a matter of law, that this was a delivery, and, having paid all dues and complied with all the regulations of the order, she was entitled to the benefits thereof. These being the facts, she was, as a matter of law, recognized as a member in good standing at the time she died and entitled to all the privileges of the society and the benefit certificate. If such were not the case, then of what benefit is a certificate, running all the risks of mistake, inaccuracy

and misstatement of fact? A certificate is the article which shows that the applicant was duly and properly initiated and obligated, and entitled to all the benefits and privileges of the society. In other words, it is an infallible statement of fact and the party issuing it would be estopped from denying or prohibiting a member from enjoying all the privileges connected therewith.

Section 211 of the society's by-laws reads in part as follows: "The liability of this society on any benefit certificate issued by it shall not begin until such certificate shall have been countersigned by the oracle and recorder of the local camp and actual manual possession be delivered to the member applying therefor, on payment to the local recorder of the assessment current at time of delivery of said benefit certificate, and while said member is in sound health, and, if a woman, not pregnant; and no officer or camp of this society is authorized or permitted to waive any of the laws of this society which relate to the substance of the contract of indemnity."

The application and the benefit certificate itself by express provision make any and all of the by-laws of the society a part of the insurance contract. Appellant contends the contract was never completed and argues that the above provision of the by-laws that "actual manual possession be delivered" must be literally fulfilled in order to establish plaintiffs' right of recovery on the contract as beneficiaries.

An analogous situation was handled in the case of *O'Neal v. Sovereign Camp, W. O. W.*, 130 Ky. 68. The case is supported by respectable authority and the opinion details a state of facts which is held to constitute a delivery in law of an insurance policy: "A certificate issued to insured on his application was received by the clerk of insured's local camp, when a mistake in the number of the camp was discovered. Insured was directed to appear for initiation and was regularly initiated, and paid all the dues and assessments, but the

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clerk returned the certificate to the sovereign camp for correction, and, before a corrected certificate was returned and delivered to insured, he was killed. *Held*, that, when insured was initiated and had paid the dues, the clerk held the original certificate, which was a valid instrument notwithstanding the error, for him, and that such acts constituted a delivery of the original certificate to assured personally as required by the society's constitution in order to initiate defendant's liability."

This rule is directly applicable to the facts shown of record in the instant case. In view of the fact that Silver Leaf Camp, No. 390, received the benefit certificate for delivery during the lifetime of Helen G. Flynn, and while she was in good health, she was entitled to possession of the same, she having been ready, willing and able to receipt for the policy, and having been duly and regularly initiated into the society, and having paid all dues. As a matter of law the recorder of the subordinate camp held the certificate for her and the acts of the defendant society constituted a delivery in law to applicant of the insurance contract.

We think the trial court was correct in directing a verdict for plaintiffs, and in all respects the judgment is affirmed.

In the matter of attorney fees, it is our judgment that a fee of \$100 in this court would be just and equitable and the same is hereby allowed.

AFFIRMED.

M. B. JENSEN & SON, APPELLEE AND CROSS-APPELLEE, V.
JASPERITE COMPANY ET AL., APPELLANTS AND CROSS-
APPELLEES: ITEN BISCUIT COMPANY, CROSS-
APPELLANT: GEORGE W. PLATNER
ET AL., INTERVENERS, AP-
PELLEES AND CROSS-
APPELLEES.

FILED MAY 26, 1923. No. 22382.

Evidence examined, and *held* to sustain the judgment of the district court as modified.

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APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed as modified.*

Carl E. Herring and Arthur C. Pancoast, for appellants.

Edward R. Burke, Montgomery, Hall & Young, Alvin F. Johnson, Baldrige & Saxton and Morsman, Maxwell & Haggart, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN and DAY, JJ., BUTTON, District Judge.

DAY, J.

This action was brought by M. B. Jensen & Son against the Iten Biscuit Company, hereinafter called the Iten Company, and Carl B. Kraus, doing business under the name of the Jasperite Company, to foreclose a mechanic's lien upon certain real estate owned by the Iten Company. The plaintiff alleged in its petition that there was a balance of \$5,481.89 due it, and prayed for a foreclosure of its lien for that amount. Plaintiff also prayed for a personal judgment for the same sum against the defendant Kraus, who was the contractor under whom plaintiff rendered the service and furnished materials as subcontractor. Kraus filed an answer to the plaintiff's claim, admitting that plaintiff was subcontractor under him, and alleged that plaintiff did not fully perform its contract; that the work done by it was so defective that he was obliged to again do the work which plaintiff had contracted to perform; that the cost to him amounted to more than the unpaid balance which plaintiff claimed; and prayed that an accounting be had between himself and plaintiff, that the lien of plaintiff be canceled and its cause of action dismissed. Kraus also filed a cross-petition against the Iten Company, claiming that there was due him upon his contract with the Iten Company the sum of \$6,535.07, and prayed for an accounting and a judgment against the Iten Company. The Iten Company filed answers to the respective petitions, and also a cross-petition against Kraus, praying for damages

against him for failing to perform his contract, and for an accounting. George W. Platner and Sunderland Brothers, who had furnished materials to Kraus for a part of the work, and who had filed liens upon the Iten Company's property, intervened and prayed that their respective liens be foreclosed.

The trial court decreed a foreclosure of the lien of Jensen & Son against the Iten Company's property for \$1,997.70, and also rendered a personal judgment in favor of Jensen & Son against Kraus for the same amount. The court also decreed a foreclosure against the Iten property of the liens of George W. Platner and Sunderland Brothers for \$907.07 and \$1,298.57, respectively, and rendered a personal judgment against Kraus in favor of Platner and Sunderland Brothers for the amounts of their respective claims. In the accounting between the Iten Company and Kraus, the court found that upon the payment by the Iten Company of the amounts found to be due to Jensen & Son, George W. Platner, and Sunderland Brothers, there would be a balance due from Kraus to the Iten Company of \$1,966.84, and entered judgment accordingly. From this judgment Kraus appeals, and the Iten Company files a cross-appeal.

It thus appears that the issues presented by the respective pleadings call for an accounting between Jensen & Son, Kraus, and the Iten Company. A number of objections which are more or less technical will be brushed aside.

The record shows that the Iten Company is engaged in the production of food products upon a large scale in the city of Omaha. It was constructing an eight-story addition to its plant, and was desirous that the floors of the building should have a hard, smooth surface capable of standing wear. About this time the Iten Company came in contact with Kraus, who claimed that he had a new process of producing a hard, glossy, durable finish on cement floors, by troweling into the mixture a com-

position of dry cement and jasperite. Thereupon the Iten Company entered into a contract with Kraus to put a one-inch topping on the floors of the building for 12 cents a square foot, the finish to be 1 part cement to $1\frac{1}{4}$ parts clear Platte river sand, jasperite to be troweled into the surface, using not less than 50 pounds to 100 square feet. Kraus guaranteed the floor against wear, and agreed to replace any part showing signs of wear within a period of 18 months. The work was to be done in a satisfactory and workmanlike manner. Kraus in turn sublet the work to Jensen & Son for 9 cents a square foot, Kraus agreeing to furnish the jasperite, the work to be done in the best workmanlike manner to the satisfaction of the owner. The written contracts between the Iten Company and Kraus, and Kraus and Jensen & Son, were very incomplete, and were supplemented by oral agreements.

The Iten Company had made arrangements for the purchase of cement for the construction of the entire building a year before the contract with Kraus was made, and furnished the cement used at a figure below the then market price. Kraus also agreed with Jensen & Son to assist them in the purchase of material by procuring the same in conjunction with other materials in the building.

We first consider the claim of Jensen & Son. The trial court reduced the amount claimed by plaintiff a considerable sum, the largest item arising out of the fact that the plaintiff had charged 10 cents a square foot, whereas under its contract plaintiff was entitled to charge but 9 cents a square foot for the work.

Kraus urged that there should have been a further reduction in the plaintiff's claim, because of poor workmanship on the part of plaintiff which necessitated Kraus again doing part of the work at a great expense to himself.

It appears that the Iten Company complained of the floors and particularly those laid on the second and

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third floors of the building. After a conference was held between the Iten Company, Kraus, and Jensen & Son, in which Jensen & Son disclaimed any responsibility for the condition of the floors, an arrangement was made between the Iten Company and Kraus by which Kraus for a consideration agreed to retop the second and third floors of the building, which he afterwards did.

The testimony upon this phase of the case shows that the plaintiff's workmen were experienced craftsmen in cement work; that the materials used were furnished by Kraus; that under the direction of Kraus the mixture of sand and cement was on the basis of one part cement to two parts sand; and that the dry coating of jasperite, which was furnished by Kraus, was put on and troweled in under the supervision and direction of Kraus. This jasperite finish was a new process which was promulgated by Kraus, and he directed the manner in which it should be laid. As the work progressed it became apparent that the use of the jasperite in the manner in which it was being used on the second and third floors was not producing a satisfactory floor, and thereafter the jasperite was run through a very fine screen, producing much better results on the other floors. It is claimed by Kraus that the faulty condition of the floors was the result of poor workmanship on the part of Jansen & Son. Upon this phase of the case, however, the testimony indicates that the imperfect condition of the floors could be attributed to so many causes for which the plaintiff was not in any wise responsible that we are hardly justified in holding that the condition of the floors arose out of faulty workmanship on the part of the plaintiff. We are of the view, therefore, that the trial court was right in refusing to reduce the plaintiff's claim on account of the fact that Kraus subsequently had to again do a part of the work at a great expense to himself.

We come now to a consideration of the testimony upon the issue between the Iten Company and Kraus. As

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before stated, Kraus claimed that there was due him from the Iten Company a balance of \$6,535.07. The Iten Company claimed that under his contract Kraus was obliged to finish the floors with a mixture of cement and sand in the proportion of 1 part cement to 1¼ part sand, but that in doing the work the mixture used was in the proportion of 1 part cement to 2 parts sand; that by doing the work in this manner Kraus did not use the amount of cement required by his contract; that he saved to himself in this manner 620½ barrels of cement, of the value of \$3,226.60. The Iten Company also claims that after the entire job was finished, the floors proved so unsatisfactory that it was obliged to have the greater part of the floors refinished at a cost of \$4,768.27, which it charges was a reasonable amount for the work done. The Iten Company prayed for an accounting. Kraus pleaded that the matters of offset claimed by the Iten Company had been settled.

Considering the evidence bearing upon the claim by the Iten Company for \$4,768.27 for refinishing the floors, it appears that after the floors were completed by Jensen & Son, or practically so, the Iten Company made objections to the floors, particularly to the second and third floors, in that the jasperite used in the topping worked out and left small pits in the surface. An arrangement was made whereby Kraus agreed to refinish the second and third floors, for which the Iten Company agreed to pay the sum of 2½ cents a square foot. This contract was reduced to writing. While the written contract is silent on the question, the testimony tends to show that one of the inducements to the contract was the acceptance of the other floors by the Iten Company. This work of refinishing the second and third floors was done by Kraus, and proved satisfactory. Without discussing the evidence, we think it was fairly within the contemplation of the parties that, upon the performing of the extra work by Kraus, all the floors were to be accepted by the Iten Company. We think the trial court was

right in refusing any offset based upon this item of damage claimed by the Iten Company.

Considering now the claim of the Iten Company based upon the allegation that Kraus did not use the quantity of cement required by his contract, the testimony in behalf of the Iten Company shows that it would have required from 620 to 625 more barrels of cement to do the work in compliance with the contract than was actually used. The testimony in behalf of Kraus shows that it would have taken 555 more barrels of cement than was used. On this question the trial court found that there was a shortage of 585 barrels of cement, which the court found to be worth \$2.24½ a barrel. As we view the evidence, there is no basis for finding the number of barrels to be 585. The evidence is undisputed that there were used in the job 925 barrels of cement, and that it was put in at the ratio of 1 part cement to 2 parts sand, instead of at the ratio of 1 part cement to 1¼ parts sand. Based upon tables of calculation used by engineers, we conclude that the correct amount of the shortage is 555 barrels.

The Iten Company also claims that the allowance by the court of \$2.24½ per barrel was much below the market price of cement at that time. Upon this point the evidence tends to show that the Iten Company had arranged to purchase the cement for the entire building a year before the contract was made with Kraus, and were furnishing the cement for this work at \$2.24½ a barrel. It seems reasonably clear that if the contractors had called for 555 more barrels of cement to finish the job, the Iten Company would have furnished the same at the same price of \$2.24½. Upon the trial it was admitted by the parties that had Kraus fully performed his contracts, there would have been due him from the Iten Company \$13,657.69, made up of items as follows:

Original contract.....	\$12,096.84
For replacing 2d and 3d floors...	771.10

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For use of hoisting engine.....	14.75
For empty sacks.....	775.00

Total.....\$13,657.69

It was also admitted that the Iten Company had paid in cash and credits upon this account the sum of \$7,107.87. This would leave a balance due Kraus of \$6,549.82. Against this amount the Iten Company are entitled to a credit for a shortage in the cement of 555 barrels at \$2.24½ a barrel, totaling the sum of \$1,245.97. Striking a balance between the amounts of the Iten Company and Kraus, there would be due and owing to Kraus \$5,303.85. The trial court decreed that if the Iten Company should pay the lien of Jensen & Son of \$4,997.70, and the lien of Platner for \$907.07, and the lien of Sunderland Brothers for \$1,298.57, in the aggregate amounting to \$7,203.34, there would then be due from Kraus to the Iten Company the sum of \$1,966.84. As above stated, this amount was arrived at by the trial court determining that the amount of shortage in the cement used was 585 barrels. Our examination of the evidence convinces us that the amount of shortage of cement was 555 barrels, which, on the basis of \$2.24½ a barrel, would make the amount due from Kraus to the Iten Company \$67.35 less than the amount found by the trial court.

It is the contention of Kraus that all matters of difference between himself and the Iten Company arising out of the claim that he had not performed his contract in accordance with its terms were fully settled by the parties by the contract of September 10, 1920, including the item now made for shortage of cement.

As before stated, after Jensen & Son had completed the work on all the floors except the eighth, the Iten Company refused to accept the work, and a conference was had between Iten Company, Kraus and Jensen & Son. The testimony shows that all the floors were examined; that the Iten Company complained that they were not satisfactory, particularly the second and third

floors. Finally it was agreed that, if Kraus would re-finish the second and third floors, the work would be accepted. An agreement was thereupon entered into whereby Kraus. was to retop the second and third floors, for which the Iten Company agreed to pay an additional sum of $2\frac{1}{2}$ cents a square foot. This additional work was done by Kraus at a considerable expense. In fact the materials furnished by Platner and Sunderland Brothers were used by Kraus in refinishing the second and third floors, and topping the eighth floor. All of the conversation leading up to the agreement related to the condition of the surface of the floors, nothing was said about there being a shortage of cement used in the performance of the work, and there is nothing in the written contract to suggest that the question of shortage was in the minds of either of the parties at the time the agreement was made. We are of the opinion that the only matter settled related to the condition of the floors. It appears that one of the officers of the Iten Company knew at the time the settlement was made that the full amount of cement called for in the contract had not been used, but, as before stated, this item was not discussed or considered.

Considering the entire record, we are of the view that the trial court was right in holding that the settlement did not include any damages which the Iten Company sustained by reason of the fact that less cement was used in doing the work than was called for in the contract. The proposal of Kraus to do the work was made upon the understanding, clearly expressed, that there was to be used 1 part cement to $1\frac{1}{4}$ parts sand. This he failed to do. It is no answer to say that a better floor was produced by the use of a mixture containing 1 part cement to 2 parts sand. It seems only just that his contract price be reduced to the extent of the value of the cement he should have used and failed to put in.

From what has been said it follows that the judgment of the trial court should be modified to the extent of

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reducing the item of \$1,313.32, the value of the cement, to \$1,245.97. As thus modified, the judgment of the trial court is affirmed. The costs in this court are to be paid by the appellant.

AFFIRMED AS MODIFIED.

**GEORGE GESSELMAN, APPELLANT, V. R. WALTER PHILLIPS
ET AL., APPELLEES.**

FILED MAY 26, 1923. No. 22379.

1. **Vendor and Purchaser:** OPTION CONTRACT. One of the essential elements of an option contract for the purchase of land is that the party giving the option parts with the right, for a limited time, to sell his land to any one other than to the party to whom the option is given.
2. **Principal and Agent.** The law will not permit an agent to profit out of the subject of the agency, at the expense of his principal, beyond the agreed commission for his services.
3. **Brokers: DUTIES: GOOD FAITH.** Where a contract between a landowner and real estate broker provides that the latter shall receive a stipulated commission in the event of a sale, and also gives him an option to purchase the land, he cannot, while acting as the agent, exercise the option to purchase without making full disclosure to his principal of any opportunity he may have to sell the land to the principal's advantage; nor can the agent, after having contracted for the sale of the land to a third party at an advanced price, exercise the option to purchase the land to the detriment of his principal.

APPEAL from the district court for Hitchcock county:
CHARLES E. ELDRED, JUDGE. *Reversed, with directions.*

Harry L. Lehman, Lambe & Butler and Walter D. James, for appellant.

Cordeal & Colfer, contra.

HEARD before MORRISSEY, C. J., ROSE, ALDRICH and GOOD,
JJ., BEGLEY, District Judge.

GOOD, J.

Plaintiff, George Gesselman, brought this action against
R. Walter Phillips, James W. Mansfield and Charles W.

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Burton, defendants, for an accounting for money alleged to have been received by them as his agents in a sale of land. Defendants prevailed, and plaintiff has appealed.

In September, 1919, plaintiff was the owner of 600 acres of land in Hitchcock county, Nebraska, that was incumbered by three mortgages. Plaintiff made application to defendants for a loan to take up the third mortgage, which was in process of foreclosure and which amounted to about \$1,300. Their negotiations resulted in defendants agreeing to take up the mortgage and carry the same for plaintiff, and to secure them the plaintiff, on September 22, 1919, executed a warranty deed conveying to the defendants 600 acres of land. At the same time the parties signed a separate contract, in the preparation of which a printed form of an agreement for sale of real estate was used. Part of the printed form was filled in, indicating an agreement to sell the 600 acres of land to the defendants for a consideration of \$15,000. The following provisions were inserted in writing:

"This is an exclusive option on this land and if sold otherwise party first part agrees to pay second parties one-thousand dollars, same as if sold by second parties. This is an option on this land for until March 1, 1920, and in case this is not sold by said date this is null and void as to both parties. If this land is sold within said time the first party agrees to pay second parties one-thousand dollars commission. Possession, if sold, to be given March 1, 1920. Deed to be given at this time. Title to be returned to first party upon payment of note & mortgage of about thirteen-hundred dollars with interest from this date at 10 per cent., taken up by second parties, if paid by March 1, 1920. Otherwise title to be absolute in second parties. In case of sale of land the \$1,300 advanced and one-thousand dollars are to be paid by (to) second parties. In case of failure to pay \$1,300 March 1, 1920, second parties are to assume \$3,500 to Southwick Loan & Trust Co. only."

On the 11th day of October, 1919, the defendants sold

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the land in question to one Weidner for \$18,000. Defendants have accounted to plaintiff for the sum of \$14,000 and no more. The plaintiff insists that defendants were acting as his agents in the sale of the land and that they should account for the full \$18,000, less \$1,000 for commission; in other words, that he is entitled to recover \$3,000 more from the defendants. The defendants in their amended answer allege that the contract, above referred to, gave them an exclusive option to buy the land at any time prior to the 1st day of March, 1920, at the sum of \$14,000, and that they exercised this option on the 4th day of October, 1919, on which date they claim to have paid to plaintiff the sum of \$1,000, as part of the purchase price.

1. Somewhat depends on a proper construction of the above mentioned contract. Plaintiff contends that it is an exclusive agency contract, whereby defendants were given exclusive right to act as brokers in the sale of the land; and defendants insist that it is an exclusive option contract, which gave them the absolute right, at any time before March 1, 1920, to purchase the land for \$14,000. In our opinion, neither contention is correct. The contract partakes of the nature of both an option and brokerage contract. It is clear that it could not have been an exclusive option contract, because, by its terms, it contemplates that a sale may be made to a third party either by defendants or others. This would be inconsistent with the idea of an exclusive option. One of the essential elements of an option contract for the purchase of land is that the party giving the option parts with the right, for a limited time, to sell his land to any one other than to the party to whom the option is given. *Pollock v. Brookover*, 60 W. Va. 75, 6 L. R. A. n. s. 403; 27 R. C. L. 334, sec. 31.

The contract also provides that, in the event of a sale of the premises before March 1, 1920, whether made by defendants or others, defendants shall have a commission of \$1,000. This clearly contemplates that defendants are to

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act as agents and receive a commission for their services, but also contemplates that it is not an exclusive agency.

2. The agency part of the contract has the effect of placing the defendants in a trust or fiduciary relationship to the plaintiff, which requires of them unswerving fidelity and absolute good faith in their dealings with their principal. The law will not permit an agent to profit out of the subject of the agency, at the expense of his principal, beyond the agreed commission for his services. *State v. State Journal Co.*, 77 Neb. 752; *Wells v. Cochran*, 84 Neb. 278.

3. While defendants were acting as agents, they were required to make full disclosure of any opportunities they may have had to sell the land that would be to the advantage of the plaintiff, before they could exercise their option to purchase the land. They could not, after having contracted for the sale of the land at an advanced price, exercise the option to purchase it themselves from the plaintiff to his detriment. It becomes important, therefore, to determine when, if ever, the defendants exercised their option to purchase the land from plaintiff. If they did exercise the option and did purchase the land prior to any sale to Weidner, or to knowledge that he would buy it at an advanced price, then they would be entitled to any profit made upon the sale of the land; and, upon the other hand, if they had contracted to sell to Weidner, or knew that he would purchase the land, at any sum more than \$15,000, prior to the time they exercised their option, then they must account to the plaintiff for the full purchase price realized, less their brokerage commission.

The evidence respecting the exercise of the alleged option by defendants is in sharp conflict. They testify that they agreed with plaintiff on the 4th day of October to take the land at \$14,000, and that plaintiff, to induce them to do so, agreed to and did give them 50 bushels of wheat. The defendants are corroborated in this by some other witnesses and by the circumstance that they produced a check, which was delivered to plaintiff, dated

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October 4, for \$1,000, and on which is written in the lower left-hand corner the words: "Part payment on ranch bought by Mansfield & Phillips over on Driftwood." Plaintiff admits the receipt of this check, but insists that it was not delivered to him until the 15th day of October, and in this he is corroborated by the testimony of his wife and daughter. Plaintiff's position is also corroborated by some other circumstances. For instance, it was shown by the testimony that he was in straitened circumstances for money at the time of these transactions. The evidence shows conclusively that the check was deposited by him in his bank on the 16th day of October. It is rather strange that one in such straitened circumstances as plaintiff was would carry the check for 11 or 12 days before cashing it. Again, the check in evidence does not bear any indication of having been worn, as it would naturally be if it had been carried for that time. But, to our mind, the most striking circumstance corroborating the position of the plaintiff is a statement rendered by defendants on the 23d day of March, 1920, when they were accounting to the plaintiff for the proceeds of the sale. In that statement they credit plaintiff with the sale price, \$15,000, and charge him with a commission of \$1,000, and the other items of payment, mortgages, etc., to the aggregate of \$15,000. This statement made by them long after the transaction is inconsistent with the position they now take that they purchased the land outright for \$14,000. If they purchased the land themselves, they would be entitled to no commission. Again, when they filed their original answer in this action, they alleged therein that they exercised their option to purchase the land on or about the 1st of November, 1919.

We are of the opinion, after careful consideration of all the evidence, that the defendants contracted to sell the land to Weidner for \$18,000 prior to the time they exercised their alleged option. This being true, they were not entitled to anything except their commission, as agents, in the sum of \$1,000. They have retained \$4,000,

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and should therefore account to the plaintiff for the sum of \$3,000.

Plaintiff claims that defendants are also indebted to him for 50 bushels of wheat, which was turned over to them, to be planted upon the premises, but which they sold and converted to their own use. The evidence discloses that there was a load of wheat, amounting to 50 bushels, turned over to defendants, but there is no evidence in the record as to its quality or value. Because of his failure of proof in this respect, plaintiff cannot recover for the wheat.

The judgment is reversed and the cause remanded to the district court, with directions to enter judgment for plaintiff in the sum of \$3,000 and interest accruing, at 7 per cent. per annum, from March 1, 1920, to the date of entering judgment.

REVERSED.

STATE BANK OF GERING, APPELLANT, V. MERTON C. GROVER
ET AL., APPELLEES.

FILED MAY 26, 1923. No. 22412.

1. **Chattel Mortgages:** PROPERTY NOT IN ESSE. A chattel mortgage upon an unplanted crop of beets is ineffectual to create a lien, either legal or equitable, in favor of the mortgagee until the intervening of some new act, as where the mortgagee takes possession of the crop after it has been planted, and the filing of such chattel mortgage constitutes no notice of a claim of lien.
2. —: **MORTGAGE ON CROPS: PRIORITY.** Where a lease provides that the lessee will execute a chattel mortgage on the crops to be raised on the demised premises to secure payment of the rent, and the lessee, after the planting of the crop, executes a mortgage for a debt due to a third person, who had no notice, either actual or constructive, of the provisions of the lease, such third party will acquire a lien on the crop superior to any right of lien in the lessor arising from the provisions of the lease.
3. —: **MORTGAGEE IN GOOD FAITH.** A mortgagee of chattels in good faith is one who takes a chattel mortgage to secure a debt actually and justly owing to him, whether preexisting or not, without actual or constructive notice of prior equities against the mortgaged property. *State Bank v. Kelley Co.*, 49 Neb. 242.

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APPEAL from the district court for Scotts Bluff county:
RALPH W. HOBART, JUDGE. *Reversed, with directions.*

Curtis O. Lyda, for appellant.

L. L. Raymond, *contra*.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and
GOOD, JJ., BEGLEY, District Judge.

GOOD, J.

Plaintiff brought this action in the district court for Scotts Bluff county, to determine the priority of liens arising from the execution of two chattel mortgages on a crop of sugar beets, one of which mortgages was held by plaintiff, and the other given to the defendant Grover, and by him assigned to defendant bank. Defendants prevailed, and the plaintiff has appealed.

The facts are not in dispute and are principally covered by a stipulation of the parties. The record shows that on March 13, 1920, the defendant Grover leased to one Marlow a farm for one year. The written lease provided that Grover should receive as rental one-fourth of all the beets delivered at the beet dump and \$350 in cash. The written lease contained the following clause: "The lessee is to give his note for this amount and to secure said note by a chattel mortgage on all of his crops." On the same day said Marlow executed and delivered to Grover his note for \$350, and at the same time executed a chattel mortgage, to secure said note, which contained the following description: "All of my 1920 crops, which will consist of forty acres of sugar beets and whatever crops I may elect to put on the balance of the farm which belongs to said M. C. Grover, and which I have today leased from him. This mortgage is intended to cover all of my 1920 crops which will be grown on the above farm." Said chattel mortgage was filed for record in the office of the county clerk on March 15, 1920.

The record further shows that on the 31st of July, 1920, the plaintiff was, by purchase in the ordinary course of

business, the innocent holder of two promissory notes, previously executed by the said Marlow, and on which there was due the sum of \$650; that on the last mentioned date said Marlow, in renewal of said two promissory notes, executed to plaintiff a new promissory note for \$650, due November 10, 1920, and secured the same by a chattel mortgage on his three-fourths' interest in 40 acres of beets on the Merton C. Grover farm, being the same farm leased by Grover to Marlow. By agreement of all parties in interest, the beets were harvested and sold and the proceeds thereof distributed to the persons entitled thereto, except \$400, which was paid into court, to be turned over to plaintiff or defendants, according to which one is found entitled thereto by priority of his mortgage.

At the time of the execution of the mortgage to Grover, the beets had not been planted and had no existence. Plaintiff contends that neither the provision in the lease nor the chattel mortgage created any lien in favor of the defendant Grover, and could not do so until the intervening of some new act previous to the execution of the mortgage to plaintiff, and that, no intervening act having occurred, plaintiff's mortgage should be decreed to be a prior lien upon the beets. On the other hand, the defendants contend that the mortgage to Grover was good as between the parties to the mortgage; that the mortgage created at least an equitable lien in favor of Grover, and that plaintiff is not an innocent purchaser or incumbrancer of the property and is not a purchaser thereof for value, because its mortgage was given to secure a pre-existing debt.

1. The rule is well established in this state that a chattel mortgage upon an unplanted crop, or upon property not *in esse*, is ineffectual to create a lien, either legal or equitable, in favor of the mortgagee until the intervening of some new act, as where the mortgagee has taken possession of the property after being planted. *Cole v. Kerr*, 19 Neb. 554; *Steele v. Ashenfelter*, 40 Neb. 770; *Battle Creek Valley Bank v. First Nat. Bank*, 62

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Neb. 825; *Brown v. Neilson*, 61 Neb. 765. In the instant case it does not appear that Grover took possession of the beets under his chattel mortgage, or that any new intervening act occurred prior to the execution of the chattel mortgage to plaintiff, so that, at the time plaintiff took its chattel mortgage, defendant Grover had no lien upon the beets by reason of his chattel mortgage, and the filing of a void chattel mortgage is not constructive notice of any lien or claimed lien.

2. We are not unmindful that this court has held in *Weigand v. Hyde*, 109 Neb. 678, that—"Where a lease provides that the lessee shall on demand execute a chattel mortgage on the crops to secure the payment of the rent, but lessee fails to do so, and executes to a third person a first chattel mortgage on the same crops, the execution thereof constitutes a fraud on the part of the lessee, as between himself and the landlord, against which a court of equity may grant relief at the suit of the lessor. In such case, the mortgagee, if he had notice of the provisions of the lease, and of the landlord's rights thereunder, is not a mortgagee in good faith, and, in an action by the lessor for specific performance of the terms of the lease, the mortgagee's rights will be subordinated to those of the lessor."

Since, in the case under consideration, the lease from Grover to Marlow was not recorded and plaintiff had no actual knowledge of the provisions thereof, it follows that it was not charged with any notice of any right of Grover to a lien on the beets.

3. Defendants' contention that plaintiff's mortgage was given to secure a preexisting debt and that its lien is subordinate to the equitable right of Grover to a lien is not well founded. This court has held in *State Bank v. Kelley Co.*, 49 Neb. 242, that—"A mortgagee in good faith is one who takes a chattel mortgage to secure a debt actually and justly owing to him, whether preexisting or not, without actual or constructive notice of prior equities against the mortgaged property." And this holding was

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approved in *Rogers v. Trumble*, 86 Neb. 316. It necessarily follows that plaintiff's lien, by reason of its chattel mortgage, was prior and superior to any right of the defendant Grover.

The judgment of the district court is therefore reversed and the cause remanded, with directions to enter judgment in favor of the plaintiff.

REVERSED.

JOHN J. LEDWITH, APPELLANT, V. CITY OF LINCOLN ET AL.,
APPELLEES.

FILED MAY 26, 1923. NO. 22387.

1. **Municipal Corporations: CONTRACTS: PAYMENT WITH BONDS.** Where there is no provision in a city charter requiring the municipal authorities to sell bonds to the highest bidder after a proper and legal notice, said municipal authorities, when authorized to issue and sell bonds to pay for a public improvement, may, the contractor consenting, deliver the bonds at par in payment of the contract price, in lieu of raising money upon them by loan and then paying that money in discharge of the contract obligation.
2. ———: ———: **INJUNCTION.** A provision in a notice to contractors that a city reserves the option to make payment in warrants or city bonds is unenforceable, except with the consent of the contractor, and if such provision prevented competition to such an extent that it increased the cost of the work, the city should be enjoined from entering into the contract.

APPEAL from the district court for Lancaster county:
WILLIAM M. MORNING, JUDGE. *Reversed.*

John J. Ledwith and *T. R. P. Stocker*, for appellant.

C. Petrus Peterson, *contra*.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, J.J., BEGLEY, District Judge.

BEGLEY, District Judge.

The city of Lincoln, having previously voted bonds to the extent of \$500,000 for the extension and improvement of the city water and light plants, caused a notice to contractors to be published calling for sealed bids to be

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received for the construction of a water and light plant at Thirtieth and A streets of an estimated cost of \$150,000. The notice to contractors contained the following provision: "The city reserves the option to make payment in warrants or city of Lincoln bonds." Sealed bids were received under said notice, all within the engineer's estimated cost, the best or lowest bid being approximately \$98,000. Plaintiff, a resident taxpayer, brought this action to restrain the sale of the bonds, "except as provided by statute to the highest bidder for cash after proper and legal notice as required by law," and to enjoin the letting of any contract for the construction of the A street power station pursuant to notice to contractors, for the reason "that said illegal notice restricts and limits the prospective bidders solely and only to those who can complete the work on their own financial ability and, when completed, be willing to take bonds and not cash." A demurrer was filed to said petition, which was sustained and the action dismissed. Plaintiff has appealed.

Appellant's first contention is that the city officials have no authority to pay the contractor in city bonds because the city charter requires the bonds issued shall be sold to the highest bidder, after giving 30 days' notice. We find no such provision in the charter relating to water and light bonds. The above provision, contained in section 36 of the charter relates only to refunding bonds issued without the consent of the voters, which has no application here. Section 1, art. VI, and section 2, art. VIII, of the city charter provide the only authority for the issuance of water and light bonds, and they contain no specific method for sale, and therefore, the statute not requiring the bonds to be sold in any particular manner. the city officials were vested with a discretion as to the method of sale or disposal, provided the bonds were not sold for less than par value, and the courts, in the absence of fraud or an abuse of the discretion vested in such officials, have no power to control their action. 28 Cyc. 1596. Under such circumstances an exchange of the

bonds in payment of the amounts to become due the contractor for material and construction would be a sale of the bonds within the meaning of the charter, and if the bonds were exchanged for their face value, this would be a sale at par value. Therefore, if the contract had been let, the city would have the right to pay the contractor with city bonds at par value, with the consent of the contractor, but the question here presented is: Can the city legally limit the bidding to contractors who are willing to take the bonds in payment of said work?

In 19 R. C. L. 1067, sec. 355, it is said: "The terms and conditions which a municipal corporation may lawfully include in its specifications for the construction of a public work are, however, subject to the following limitations: (1) When the statute requires competitive bidding the conditions must not be such as to prevent or restrict full and free competition. (2) The conditions must not be such as to increase the cost of the work for the benefit of a favored class, and thus result in the taxation of the people of the municipality for a private purpose. (3) When the work is to be paid for by special assessment the conditions must not be such as to add an element to the cost of the work which cannot lawfully be met by special assessment."

The option here claimed by the city seems to confine the bidding to persons able to accept the city's bonds or warrants in payment, and would necessarily limit those who bid to such as are able to construct the building on their own financial responsibility, and in this manner restrict competitive bidding. The bid which the contractor submits is regulated by the price he can receive for the bonds upon the market, and, unless he is a man of financial means, he must necessarily dispose of them quickly and at a discount, and to offset this must raise his bid, thus increasing the cost of the work for the benefit of a favored class who are financially responsible.

This question was decided in this state in the case of

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State v. School District, 16 Neb. 182, where the court said: "When money is actually borrowed and received into the school district treasury, the contract for the erection of a schoolhouse, etc., may always be let at a reasonable cash price, after a fair competition among the contractors and builders of the vicinity; but when there is no money in the treasury, and the building is to be paid for in bonds, then the competition is confined to those persons of the neighborhood who combine the character of contractor and builder with that of capitalist or stock broker, and so in the latter case it is not only improbable, but well nigh impossible, that the same quality of building could be procured as economically as in the former."

In *Miller v. City of Des Moines*, 143 Ia. 409, 419, the court aptly said: "Government is instituted for the benefit of all the people and not for the benefit of any one class to the exclusion of others. City officials are charged with the collection and disbursement of vast sums of money to which all the people must contribute in proportion to their estate without regard to social position, political affiliation, religious belief or economic theories. Experience has shown that the interests of the taxpayers are best conserved by offering contracts for public work to the competition of all persons able and willing to perform it. When the opportunity to compete is fairly and openly offered, and contracts are fairly awarded, there is ordinarily no room for official or private graft at public expense, but just in proportion as competition is restricted, and the award is hedged about with express or implied conditions by which a favored person or a favored class is insured a preference over others of equal ability and capacity, public rights are imperiled and public interests are sacrificed. Such discrimination tends to monopoly, and involves a denial of the equality of right and of opportunity which lies at the foundation of republican institutions."

Appellees cite and rely upon the case of *Washington-Oregon Corporation v. City of Chehalis*, 76 Wash. 442.

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In that case a statute referring to general fund bonds issued by any municipality provided that such bonds should be sold in such manner as the corporate authorities shall deem for the best interest of the city, and it was held that such provision was broad enough to permit the city to exchange its bonds in payment of amounts due a contractor under specifications providing that the contractor would be paid in bonds voted for that purpose, no question of fraud or restrictions on competitive bidding being involved. In this case the city charter only provides for the right to borrow money by the sale of the bonds at not less than par or face value. In addition, the petition herein contains the allegation, which is admitted by the demurrer, "That said notice, by being limited to contractors, restricts same from being sold to the highest bidder, and, further, said notice is a mere sham and pretext by means of which, by increased bids, the bonds may in fact be disposed of below par."

The petition of the plaintiff, therefore, stated a cause of action, and if it be proved on the trial that said provision prevented competition to such an extent that it increased the cost of the work, the contract should not be entered into.

The judgment of the district court in sustaining the demurrer is, therefore,

REVERSED.

Rose, J., dissents.

THEODORE HAPP, APPELLEE, V. PATRICK G. DUCEY: O. T.
IRWIN ET AL., APPELLANTS.

FILED MAY 26, 1923. NO. 22427.

1. **Bills and Notes:** BONA FIDE PURCHASER. Where the consideration for the purchase before maturity and without notice of a negotiable promissory note, by regular indorsement, was a sale of real estate, and the deed therefor had not been delivered, but was left with a bank for delivery to grantee upon payment of \$500, the remainder of the purchase price, *held*, that the vendor was

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entitled to protection as a *bona fide* purchaser, as against a claim of the maker of the note against the payee thereof.

2. **Statute of Frauds.** The fact that the agreement for sale of the real estate was not in writing is no defense, as defendants were not parties thereto, and the defense of the statute of frauds is personal to the parties.

APPEAL from the district court for Platte county: A. M. POST, JUDGE. *Affirmed.*

Vail & Flory, for appellants.

Albert & Wagner, contra.

Heard before MORRISSEY, C. J., DAY and ALDRICH, JJ., COLBY and REDICK, District Judges.

REDICK, District Judge.

Action upon a negotiable promissory note for \$2,000, signed by Paul Rudolph, payable to O. J. Irwin, and by him indorsed before due to Patrick G. Ducey, and by Ducey indorsed before due to plaintiff. Defendants Rudolph and Irwin admit the note, but claim an offset against Ducey, alleging that, as a part of the transaction resulting in the giving of the note, Ducey agreed to pay the interest to March 1, 1920, on certain mortgages upon lands conveyed by Ducey to Rudolph, amounting to \$1,200, which he failed to do.

Plaintiff acquired the note as part of the purchase price of a house and lot, and placed the deed conveying the property to Ducey with a bank, to be delivered upon Ducey paying the remainder of the purchase price, \$500. Ducey was in possession of the property as tenant at the time of the purchase, had paid one month's rent, but after the purchase continued in possession under the contract, which was verbal.

Defendants claim the contract was void under the statute of frauds, but, not being parties to it, cannot raise the question. *Rickards v. Cunningham*, 10 Neb. 417; *Cresswell v. McCaig*, 11 Neb. 222.

The only other question is whether the evidence shows plaintiff to be a purchaser in good faith for value without

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notice. The evidence does not warrant any inference of bad faith; but defendants claim that, as the sale of the lot has not been completed by delivery of the deed, plaintiff may refuse to deliver it except upon Ducey making good defendants' claim against him.

We think, however, Ducey may enforce delivery of the deed upon payment of the \$500, and that plaintiff cannot be required to breach his contract in order to assist defendants in collecting their claim against Ducey.

The cases cited by defendants where the purchase price had not all been paid before notice are not applicable, for plaintiff had paid the full amount for the note by a valid and binding contract to convey the lot: the note was in part payment of the debt, and was credited thereon, and the case is within the principle that a purchaser without notice before maturity of a negotiable instrument, by crediting the amount thereof upon a preexisting debt, is a purchaser in good faith, as held in *Smith v. Thompson*, 67 Neb. 527, and *Martin v. Johnston*, 34 Neb. 797.

JUDGMENT AFFIRMED.

BESSIE CRAVER ET AL., APPELLANTS, V. THOMAS B.
MCIPHERSON, APPELLEE.

FILED JUNE 27, 1923. No. 22911.

Appeal: EXCLUSION OF EVIDENCE. When on the trial of a cause to a jury the court erroneously excludes competent evidence and then directs a verdict against the party making the offer because the issue to which the excluded evidence relates is not satisfactorily proved, the judgment will be reversed on appeal.

APPEAL from the district court for Douglas county:
JAMES M. FITZGERALD, JUDGE. *Reversed.*

Morsman, Maxwell & Haggart, for appellants.

Baker & Raddy and *Byron G. Burbank*, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN and DAY, JJ., BUTTON, District Judge.

MORRISSEY, C. J.

Craver v. McPherson.

This is the second appeal in this case, our first opinion being found in 106 Neb. 568. The action is based upon a promissory note given by defendant to Kate McGinness, together with a contemporaneous memorandum signed by the payee of the note. On the former appeal the only question presented was the sufficiency of the petition to state a cause of action. A demurrer had been filed to the petition and sustained by the trial court, but on review this court held the petition sufficient and remanded the cause for a new trial. Before the institution of the suit the payee had died, her estate was duly administered, and this suit is brought by the residuary legatees under her will. A copy of the note and memorandum are set out in the former opinion, but for convenience they will be set out here. They read as follows:

"\$37,000. Omaha, Neb., November 27, 1908.

"One year after date, for value received I promise to pay to the order of Mrs. Kate McGinness, at the Union Stock Yards National Bank, South Omaha, Nebraska, thirty-seven thousand dollars, with interest at the rate of 6 per cent. per annum from date until paid.

"Thomas B. McPherson."

"Omaha, Nebraska, November 27, 1908.

"Whereas, Thos. B. McPherson has acted as agent for many years for my late husband, Daniel McGinness, and after his death for me, in the loaning of certain money for us and in our behalf;

"Whereas, he is now holding for me notes as herein-after described;

"Whereas, he has executed his own note of even date herewith for thirty-seven thousand dollars (\$37,000) payable to me, pledging as collateral the notes above referred to, to wit:

"Walker Manufacturing Co., \$18,171.98 and int. due Nov. 14th, 1909.

"A. A. Spaugh, \$9,386.16 and int. due Dec. 7th, 1909.

"Prime and Tower, \$12,000 and int. due Jan. 26th, 1912.

"Whereas, the note for thirty-seven thousand dollars is really not his personal obligation and is only given to protect me from loss upon the notes he has taken for my account:

"Now, therefore, in consideration of the premises, I hereby agree to hold his note for thirty-seven thousand dollars, and not to transfer or dispose of it without his consent in writing.

"I further agree that the collateral notes referred to shall be held by him; and he is hereby empowered to collect, renew or extend them, and to substitute for them other collateral at his discretion.

"I also agree to exhaust my collateral, whatever it may be, before demanding payment from him of any part of this obligation, or attempting to collect any part of his personal note, unless there should be a loss in the collateral referred to, in which case he shall be liable for such deficiency.

"Provided, however, that he shall pay me, annually, interest at the rate of six per cent. upon the whole or such part of the principal as may be unpaid from time to time.

"Witness my hand day and date first above written.

"(Signed) Kate McGinness."

Defendant filed an amended answer which admitted that he signed the note, but denied the delivery to the payee. He admitted that the payee signed her name to the memorandum, but denied that he accepted the same or that it constituted any liability against him. He alleged that in 1896 Daniel McGinness, the husband of the payee of the note, placed in defendant's hands \$37,000, with instructions to defendant to loan the same in his own name, but for the use and benefit of him, Daniel McGinness; that for many years thereafter and until the death of McGinness in 1907 defendant continued to loan the money for McGinness and took notes in the name of defendant as payee; that the interest received upon the loans was paid to Mc-

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Guinness during his lifetime and that the defendant received no compensation for his services; that after the death of Daniel McGinness, the payee of the note in suit, his widow Kate McGinness, claimed ownership of the \$37,000, and defendant at her request continued to loan the same as he had theretofore done for her husband, and that he received no compensation from her for his services; that in loaning the money defendant took the notes in his own name with the knowledge and approval of the owner of the money, and that defendant frequently made loans in excess of \$37,000 and the excess over that amount was the money of defendant; that at no time prior to the death of Daniel McGinness had he ever claimed that defendant was indebted to him for any portion of the \$37,000; that on November 27, 1908, defendant had loaned the \$37,000 before mentioned, together with some of his own money, as follows:

Walker Manufacturing Company...	\$18,171.98
A. A. Spaugh.....	9,386.16
Prime and Tower.....	12,000.00

\$39,558.14

The answer in some detail recites that the money had theretofore been loaned to another party, and sets out excerpts from correspondence between defendant and Kate McGinness, and alleges that on November 27, 1908, he sent Kate McGinness the note now in suit together with a letter in which he said:

"I will send you my note to show in case of my death just what collateral is yours and when and as it is changed (I mean the collateral) your envelope in safe will always contain your stuff. Now my note means nothing more than a memorandum for you to hold. The real paper on which you must depend is the collateral and I will try my best, as I always have, to get good paper for you. Of course, I will advance you the interest if necessary so you can depend upon it the day

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'tis due. I will send you for my protection a statement for you to sign and return."

The "statement" mentioned in defendant's letter was in the words and figures in the memorandum heretofore set out, except that it did not contain either of the last two paragraphs thereof. The record discloses that Mrs. McGinness did not sign or execute the memorandum which defendant mailed to her, but that she had the same rewritten with the two concluding paragraphs added thereto, and in due course of mail sent the same to defendant, who retained it. The answer alleged that on January 19, 1909, defendant held the note of one W. J. McLaughlin for \$25,000 and the note of Prime and Tower for \$12,000, and that on that date he wrote Mrs. McGinness and said:

"I enclose copy of note of W. J. McLaughlin, which I substitute for the Walker and Spaugh paper, I held for you. McLaughlin makes a property statement showing over \$300,000 assets and no liabilities. This note with that of Prime and Tower covers the exact amount of your investment."

And it is alleged that on the 24th of the same month Mrs. McGinness wrote defendant acknowledging receipt of the McLaughlin note. It is next alleged that the correspondence heretofore mentioned and the \$37,000 note in suit and the memorandum which defendant sent with the same were all parts of one transaction, which were rejected by Mrs. McGinness, and that defendant never received any consideration from any person for becoming liable on the note in suit nor did Mrs. McGinness suffer any loss or lose any rights against the makers of the notes by reason of any act of defendant, and that she knew at all times that the note in suit was intended to be a memorandum only and not a personal obligation of defendant; that the Prime and Tower note was paid to the administrator of the estate of the payee of the note in suit; and that the McLaughlin note was substituted for the other two notes with the consent of Mrs.

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McGinness. The answer, which is so long it cannot be set out in detail, alleges also that the administrator of the estate of Kate McGinness undertook to collect the amount due on the McLaughlin note, and did realize \$1,000 from the sale of some collateral given to secure the payment of the same, and that in his own name he secured judgment against McLaughlin.

In this connection it may be said that the judgment against McLaughlin is not collectible. As a further defense it is alleged that the statute of limitations has run against the note. In support of this allegation it is specifically alleged that on January 4, 1911, and at other times during the years of 1911 and 1912 the administrator of the estate of Kate McGinness, deceased, made demands upon defendant to pay the balance due upon the note in suit; that the demands were refused and defendant denied all liability upon the note; that the note became due November 27, 1909; that the last money paid on account of the original indebtedness was paid January 22, 1912, being the amount of the Prime and Tower note; that more than five years had elapsed since the demands by the administrator and more than five years had elapsed since the payment of the \$12,000 and the bringing of the suit on February 2, 1918.

Plaintiffs filed a reply denying generally the affirmative allegations contained in the answer, but admitted that on January 19, 1909, defendant held for Kate McGinness the notes of the Walker Manufacturing Company, A. A. Spaugh, and Prime and Tower, and that on or about that date defendant substituted for the notes of Walker Manufacturing Company and A. A. Spaugh the note of McLaughlin for \$25,000, which defendant then held and which was his personal property. The reply alleged also that the substitution was made under the authority conferred upon defendant by the memorandum signed by Kate McGinness which is heretofore set out; that the memorandum was then in possession of defendant and had been accepted by him, and that by reason of its

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acceptance defendant was permitted to retain possession and control of the notes of the Walker Manufacturing Company, A. A. Spaugh, and Prime and Tower, and was permitted to substitute the note of McLaughlin for the notes of Walker Manufacturing Company and A. A. Spaugh, and that defendant is barred and estopped from asserting that he did not accept the memorandum.

Evidence in respect to the issues presented was submitted, and at its conclusion the court directed a verdict in favor of defendant and against the plaintiffs. The plaintiffs have appealed.

One hundred and twenty-four assignments of error are set out in the brief, but as most of these assignments relate to the ruling of the court on the admission or exclusion of evidence we do not deem it essential to a disposition of the case to take them up seriatim.

Many rulings on the evidence might have been erroneously prejudicial had the cause been submitted to the jury. But as the court, for reasons not based upon the objectionable evidence admitted or upon the whole record before the court, but for the reason stated by the court in its instructions to the jury, directed a verdict, we think this appeal may be disposed of by a consideration of the reason assigned by the court for its direction. The court stated:

"The agreement here entered into is that, at most, if the plaintiffs exhaust their remedy against McLaughlin, then the defendant would be liable; and the transcript of the record of the judgment that was obtained out in Fremont county, Wyoming, against McLaughlin, I cannot admit here as the transcript of the record of the suit on this case, for the reason that there is nothing reciting what it is on, excepting it claims that it is on a note. But the transcript indicates that the suit is by the representatives and heirs of the deceased, Kate McGinness; whereas this note runs to McPherson; and judgment for \$37,000 on a \$25,000 note, it seems, is too far-fetched to allow any dispute on that. If I submitted

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it to you, I am satisfied you would take the same view of it."

In defendant's amended answer he specifically alleged that the administrator of the estate of Kate McGinness "undertook the collection and enforcement of the note of W. J. McLaughlin for \$25,000 and proceeded * * * in his own behalf to secure judgment against him." And defendant's counsel in his opening statement to the jury stated that the administrator had recovered a judgment against McLaughlin on this note. Plaintiffs' offer of a duly authenticated transcript of an execution issued on the judgment, with the return of the sheriff thereon, was likewise excluded by the trial court. The correspondence in evidence shows to almost a moral certainty that the judgment, a transcript of which was offered, was based upon the McLaughlin note. These transcripts were offered for the purpose of showing that the preliminary steps required to be taken under the memorandum pleaded had been taken; that neither the note nor judgment had been paid and the contingent liability against defendant had accrued, and it was error for the court to exclude them. 22 C. J. 816, sec. 930.

The statute of limitations was in issue under the pleadings and proof, and it is contended by appellant that on this issue alone the judgment may be sustained. We do not so construe the evidence.

From a consideration of the entire record, the conclusion is irresistible that plaintiffs were entitled to have the transcript admitted in evidence and to have their cause submitted to the jury under proper instructions, and it was therefore error for the court to direct a verdict for defendant.

The judgment is reversed and the cause remanded for further proceedings.

REVERSED.

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G. W. WATKINS, APPELLEE, v. JOHN HARRISON, APPELLANT.

FILED JUNE 27, 1923. No. 22420.

1. **Husband and Wife: DEED.** After dower had been abolished in this state, a husband and wife to whom certain real estate had been conveyed by deed of general warranty, naming each of them as grantee, executed a conveyance reciting, "We do hereby sell and convey unto" the grantee the land described in the conveyance to them. The deed contained the usual covenants of title and warranty. Said deed is sufficient to convey all the interest of the wife in the premises, even though it further recites that the wife "hereby relinquishes her dower and courtesy in and to the above described premises." Comp. St. 1922, secs. 5591, 5594.
2. **Specific Performance.** Evidence examined, and *held*, to sustain the decree of the trial court requiring specific performance.
3. **Vendor and Purchaser: RESCISSION.** In order to be entitled to rescind a contract for the sale of real estate, the vendee must place, or offer to place, the vendor *in statu quo*, and where the vendee has leased the premises and the tenant is in possession, and has placed the contract of sale upon record, thus clouding the title of the vendor, the vendee is not entitled to the return of the money paid until the contract has been released or satisfied of record, and he is ready, willing and able to surrender possession.
4. **Appeal.** Where no cross-appeal is filed, and the appeal is not well taken, the court will not change or modify the decree of the district court for the mere purpose of affording appellee a larger measure of recovery.

APPEAL from the district court for Red Willow county:
CHARLES E. ELDRED, JUDGE. *Affirmed.*

E. J. Lambe, for appellant.

C. D. Ritchie and Stewart, Perry & Stewart, contra.

Heard before MORRISSEY, C. J., LETTON, GOOD, and DEAN, J.J., BLACKLEDGE, District Judge.

LETTON, J.

Action for specific performance of a contract for the sale of real estate. The court found for plaintiff and awarded specific performance. Defendant appeals.

On July 17, 1920, plaintiff, the owner of the land, entered into a written contract with defendant for its sale,

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which provided that the purchase price should be \$31,000, \$5,000 to be, *and was*, paid at the execution of the contract, and \$14,000 on March 1, 1921. The purchaser agreed to pay a mortgage on which there would be due and unpaid on March 1, 1921, a balance of \$12,000. The vendor agreed to furnish the vendee a "warranty deed and a good and merchantable abstract of title on or before March 1, 1921; to pay all taxes for 1919 and 1920; and to pay interest on the mortgage up to March 1, 1921." The vendee was to retain all crops grown on the land during the crop season of 1920. The \$5,000 was paid when the contract was executed.

There is a slight conflict in the evidence, and in the following account we are stating the conclusions drawn by us from the testimony. At the time the contract was executed plaintiff inquired of defendant whom he desired to examine the title for him. Defendant named a lawyer in Indianola, the town in which he lived. Plaintiff resided at McCook. A few days afterwards the abstract of title was sent by plaintiff to this lawyer in Indianola, with a letter, part of which is as follows: "Please put this abstract in such condition that you would pass the title. You will have until next March 1, if necessary, but would like it gotten out between now and then."

In the latter part of January, 1921, plaintiff received a letter from this examiner suggesting that in a previous conveyance by Charles M. Garst and Nettie C. Garst, husband and wife, who each owned an undivided half interest in the land, the wife had only conveyed her dower interest; that at that time the right of dower had been abolished, and requesting a quitclaim deed from the wife because the deed did not convey all her interest. Plaintiff sent to Iowa, where the parties resided, and obtained a quitclaim deed, which he forwarded to the examiner. About the middle of February he received another letter from him, saying this quitclaim deed was not satisfactory, and inclosing a new form of deed. He sent this to Iowa, but it was not returned to him until March 2, 1921. He

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then returned it for the signature of witnesses, and did not again receive it until March 7, properly executed. Defendant knew during the winter that the abstract had been sent to the examining attorney at Indianola. On September 12, 1920, the dwelling-house, which was uninsured, was destroyed by fire. After it became known that the house was burned, the parties had several conversations with respect to this fact, defendant insisting that he wanted the house restored or replaced, and plaintiff denying his liability to do so. In the interim defendant had some doubt as to whether he could raise the \$14,000 necessary by March 1, 1921, and suggested to plaintiff that he could pay \$7,000 at that time if plaintiff would be willing to wait some time for the balance, to which plaintiff assented. On March 1, 1921, defendant went to the lawyer in Indianola and asked him for his opinion as to the title. **Being busy at the moment**, the examiner later in the day, in a written communication addressed to both plaintiff and defendant, expressed his opinion that, since Mrs. Garst had done nothing more than convey her dower, she had never conveyed away her fee simple title in the land, and therefore plaintiff had a good marketable title to a half interest in the premises only.

On the same day defendant went to McCook and tendered to plaintiff a check for \$14,000, payable to himself and unindorsed, and demanded an abstract showing a marketable title, the restoration of a house, and a deed for the land. A deed was duly tendered to defendant, and he was told that the abstract was in the office of the lawyer in Indianola. He asked for the money he had paid, and refused to take the deed. A day or two later he rescinded the contract by letter on the ground that plaintiff had failed to fulfil the terms of the contract on his part. The money to reduce the mortgage debt to \$12,000 was remitted on February 27, 1921. On March 7, 1921, the quitclaim deed arrived, was placed of record, and the taxes for 1920 paid. A deed according to contract

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was again tendered to defendant, which he refused to accept.

There is a controversy between the parties as to whether the Indianola lawyer represented the plaintiff or the defendant, but we are satisfied from the evidence that in passing upon the abstract and examining the title he was acting for the defendant. In preparing the quitclaim deed and advising plaintiff as to what he thought to be a defect in the title he acted for plaintiff. It is not unusual for abstracts to be furnished by a vendor to the attorney who will pass on the title for a vendee, and to authorize and empower him to clear the title so that he will be willing to approve it on behalf of the vendee. Under the terms of the Nebraska statute with respect to real estate, there was a merchantable title to the land even without the execution of the quitclaim deed from Mrs. Garst. Sections 5591, 5594, Comp. St. 1922. The deed recited that "we" "sell and convey" to the grantee named, and contained all the usual covenants of title, by both grantors.

We are also satisfied that the moving cause of defendant's refusal to accept the land was the destruction of the house by fire. This was not a valid excuse for failing to carry out the contract. *McGinley v. Forrest*, 107 Neb. 309.

On August 20, 1920, the defendant executed to one Fisher, then in possession as a tenant of plaintiff, a lease for the land beginning on March 1, 1921. Relying upon the terms of this lease, Fisher sowed from 250 to 300 acres of wheat that fall. He was in possession under the lease on March 1, 1921.

Furthermore, on February 25, 1921, defendant procured the contract to be recorded in the office of the county clerk. This was an assertion of an interest in the land, and cast a cloud upon plaintiff's title. On March 1 he did not offer to place plaintiff *in statu quo* by releasing or satisfying this instrument of record, and hence his tender, on that account, as well as upon others, was unavailing to establish performance on his part. While the contract provides

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that "time is an essential element in this contract," we are satisfied that the contract was substantially performed by plaintiff upon the 1st day of March, and the defendant had no reasonable excuse for failing to perform on that day.

The decree of the trial court allowed defendant credit for \$1,500, which was found to be the value of the house which had been destroyed by fire. He was thus given the benefit of the only substantial objection which he really had to the performance of the contract. There is no cross-appeal by plaintiff.

AFFIRMED.

GUY WEST, APPELLANT, V. DORA OFE, APPELLEE.

FILED JUNE 27, 1923. No. 22430.

Parent and Child: CUSTODY OF CHILD. "In a controversy for the custody of an infant of tender years, the court will consider the best interests of the child and will make such order for its custody as will be for its welfare, without reference to the wishes of the parties." *Schroeder v. State*, 41 Neb. 745.

APPEAL from the district court for Antelope county:
WILLIAM V. ALLEN, JUDGE. *Affirmed*.

J. C. Alexander, R. H. Rice and Lyle E. Jackson, for appellant.

Williams & Kryger, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and DEAN, JJ., BLACKLEDGE, District Judge.

LETTON, J.

This is an application for a writ of habeas corpus brought by the father of Mae West, a child about 8 years of age at the time of the trial. The petition alleges that, while she was in the lawful custody of the father, she was taken and carried away by persons unknown to him, and she is now unlawfully deprived of her liberty by Dora Ofe, the respondent.

The evidence shows that since a few days after the

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birth of the child, and until June, 1921, her care and custody were with the respondent, who is her mother's sister; that respondent has the same affection for her that she would have if she were her own child; and that her mother died a short time after the birth of the child.

Respondent testifies that, just prior to her death, the mother requested respondent to take and care for her and act as a mother to her; but relator has produced testimony as to the statements made by respondent to others, which seems to cast doubt upon this testimony. For two years of this time respondent kept house for the relator, receiving nothing for her services and very little for the maintenance of the child. She also testifies that she told relator when she took the child that, if she was not to be permitted to keep her permanently, they must take her then and not wait until she had formed an affection for her, and under these conditions the child was left with her.

Respondent is a seamstress, she has a comfortable home, and if the child remains with her, she is willing to waive any question of compensation for what board and clothes she has already supplied. The child would rather remain with her than live with her father and step-mother.

The evidence on behalf of relator shows that he was married the second time in February, 1920; that he is 40 years old, living upon a farm which he owns; that he has been a farmer all his life; that his home is about two and a quarter miles from a schoolhouse, and five miles from a church; that the school is the ordinary country school of eight grades. The mother of the child died eight days after her birth. He testified that, after respondent decided not to keep house for him any longer, he wanted to take the child, but respondent objected and wanted to keep her, and that he finally agreed to leave the child with her for an indefinite time; that his mother at that time offered to take the child and was in a

position to have kept her; that he contributed all the money respondent said he owed her for the care of the child, \$95 in all; that some times it was quite a long period between his visits to the child, once in six months in 1920, but that he has seen her probably once in every two or three months during the last two years. He has no other children.

The court found that the child was not unlawfully held in custody, and that the respondent is entitled to her care, custody and control.

The law is well settled as to the respective rights of these parties. We have said that the right of a parent to the custody of a minor child of tender years is not lightly to be set aside, and that the court may not deprive a parent of such custody unless he, or she, has forfeited the right, or is not a proper person, or not living under such conditions that it is for the best welfare of the child that it be kept in his, or her, custody. Our earlier decisions laid rather more stress on the rights of the parents than the later. The rights of the parents must not be disregarded, but if a parent has surrendered the care and custody of a child while it is a mere babe in arms to its maternal aunt, who has exercised a mother's care over it, whose love for the helpless infant has grown with its growth, and strengthened with its strength, whom the child regards as a mother, and who at the same time is able and willing to furnish the child a good home, care for and educate her, while the parent, by his own admission, has failed adequately to provide for the child, and only visited it at intervals of several months, it seems to us that the welfare of the child can better be subserved by leaving her with the aunt whom she loves and looks upon as a mother and who is lavishing upon her maternal affection. Furthermore, while there is nothing to show but that the stepmother is an estimable woman, there is evidently a coldness of feeling existing between the child and her, which tends to unhappiness for both.

The trial judge had the advantage of seeing the parties

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and hearing their testimony. We find that his judgment is supported by the evidence.

AFFIRMED.

TEOFIL NENEMAN, APPELLEE, v. CHARLES E. RICKLEY,
APPELLEE: THOMAS W. ARMSTRONG, APPELLANT.

FILED JUNE 27, 1923. No. 22450.

1. **Husband and Wife: ANTENUPTIAL CONTRACT.** An antenuptial contract in consideration of marriage, and the mutual exchange *in presenti* of an interest in the property of the other, if fairly and equitably made and entered into in good faith, will not be disturbed after the death of one of the parties.
2. ———: ———: **CONSTRUCTION.** The antenuptial agreement set forth in the opinion *held* to be an executed and not an executory contract, and to convey *in presenti* an undivided one-half interest in the property of each of the contracting parties to the other. *Held*, further, that it was sufficient to vest in the survivor all the property of the deceased party, subject to the claims of creditors.
3. ———: ———: **CONSIDERATION.** The subsequent marriage of the parties and the mutual grants contained in the instrument furnished sufficient consideration to uphold the instrument.
4. **Evidence: ADMISSIBILITY: DEEDS.** The certificate of a notary public in proper form to the acknowledgment of a conveyance of real estate is sufficient to authorize the deed to be given in evidence without further proof of its execution.
5. **Evidence** examined, and *held* not to sustain the charge of fraud, or the charge that the terms of the instrument are unconscionable.

APPEAL from the district court for Douglas county:
CARROLL O. STAUFFER, JUDGE. *Affirmed.*

W. W. Slabaugh and A. H. Murdock, for appellant.

E. C. Hodder, W. L. Baughn and Joseph Rapp, Jr.,
contra.

Heard before LETTON, ROSE, DAY and ALDRICH, JJ.,
REDICK, District Judge.

LETTON, J.

Plaintiff, on September 3, 1920, entered into a written contract with Charles E. Rickley, as the owner of the property, for the purchase of certain real estate in Omaha.

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Part of the price was paid in cash, and the balance was to be paid in monthly payments. None of these deferred payments has been made because one Thomas W. Armstrong claims an interest in the real estate as the heir of his mother, Mary A. Rickley, formerly Mary A. Armstrong. He asserts that on her death her husband, Charles E. Rickley, became entitled to only a one-fourth interest in the property, and that he, Armstrong, became the owner of a three-fourths interest. Plaintiff prays that the title to the property be quieted in him and Rickley, as against Armstrong, and that he be allowed credit on the contract for the amount that Rickley has collected as rent, with interest. Rickley filed a cross-petition setting upon an antenuptial agreement and contract whereby, on the death of his wife, Mary A. Rickley, the absolute title to the property vested in him. He alleges that, upon the settlement of his wife's estate, the decree of the county court established the heirship to the property in him; that he has been in possession of the same since 1909, and that Armstrong is guilty of laches, and is estopped from claiming any title to the property.

Armstrong pleaded to the petition, and to the cross-petition of Rickley, alleging that the contract referred to was procured by Rickley without consideration; that Rickley falsely represented to his mother that he was possessed of real estate of equal value to that of her property, and that he would convey to her a half interest in the same; that her property was worth \$7,500, while his property was worth only \$1,250; that the contract was abandoned, and that neither party ever received a part of the income arising from the property belonging to the other. He denies delivery of the contract, and pleads that by reason of Rickley's attitude toward the possession during the lifetime of Mrs. Rickley, and his filing an inventory, as her administrator, returning the property as a part of her estate, he is now estopped from claiming any benefit under the terms of the contract. He

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prays that his title be quieted to a three-fourths interest. The court found against Armstrong, and he appeals.

The facts are that about June 1, 1909, Mary A. Armstrong, the mother of the defendant Armstrong, who was her only child, entered into an antenuptial agreement with Rickley. A few days afterwards they were married. She died September 10, 1913. After the marriage they occupied one of the flats on the property as their home for several years. Rickley testified that he had taken his wife on a trip to Oklahoma with him in 1913 and she became ill. They returned to Omaha; he employed two nurses to care for her, and while he was absent on business two of her sisters took her to their home in Lincoln, where she died. A copy of what appears to be an unprobated will executed by Mrs. Rickley in Lincoln a short time before her death was received in evidence. In this bequests of \$500 each were made to her two sisters who lived in Lincoln, a one-fourth interest in the Omaha property was left to her husband, and Armstrong was made residuary legatee. There is no proof as to the condition of Mrs. Rickley, or the circumstances under which this document was executed.

Some sort of a compromise, or settlement, was afterwards had whereby Rickley furnished money to settle the claims of creditors and for funeral expenses, etc., and the alleged will was never offered for probate. Armstrong does not appear to have been a party to this agreement. Rickley was appointed administrator of the estate. He returned an inventory listing the property as belonging to the estate of his wife. It is said by Armstrong that, in the petition for the appointment of an administrator, Rickley alleged that he and Armstrong were the sole heirs at law of the deceased. This is an error; the petition alleges "that the heirs and *other persons interested* in the estate" are himself and Armstrong. Rickley also filed a claim against his wife's estate for money advanced to her and money expended on her property. He testifies that he paid off a number of creditors and took assignments

of their claims (which are included in the claim filed by him) to himself for the purpose of settling the estate promptly. These facts are relevant, but not controlling. It is worthy of note, also, that the county court made a finding in the final decree reciting the terms of the antenuptial agreement as to survivorship, so that Rickley was evidently claiming under it at that time.

The antenuptial agreement and conveyance is as follows:

"This agreement entered into this — day of June, 1909, by and between Charles E. Rickley and Mary A. Armstrong, both of the city of Omaha and Douglas county, Nebraska, witnesseth:

"1. That these parties hereby agree to enter into the marriage relation and hereafter live together as husband and wife.

"2. That all moneys or property hereafter acquired or accumulated by them, or either of them, shall be held in joint and equal ownership.

"3. That each of these parties hereby grants, bargains, sells and conveys to the other an undivided one-half ($\frac{1}{2}$) interest in all the property, real or personal, which he or she now owns for the purpose and with the intent of vesting in both parties the joint ownership of all property at this date owned in severalty by either of them.

"4. In case of the death of one of these parties, all of said property shall, subject to the claims of creditors, vest absolutely in the survivor.

"5. Any property or interest in property owned by the said Charles E. Rickley and situated in Sheridan county, Nebraska, is not intended to be embraced within or affected in any way by this contract, but is, on the contrary, expressly excepted from its operation.

"6. The consideration for this agreement is the marriage to be entered into pursuant to its terms and the mutual promises and grants herein contained.

"Witness: J. J. Sullivan.

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"C. E. Rickley,

"Mary A. Armstrong."

The instrument is acknowledged before a notary public in the usual form for a conveyance.

Armstrong insists that the antenuptial contract is void, and is contrary to the laws of this state; that it does not create a joint tenancy; that it is unconscionable and was a fraud upon Mrs. Armstrong and the appellant, there being no just consideration for it; that it was abandoned by the parties, and that there is no competent evidence that it was ever executed.

Under section 4818, Comp. St. 1922, the certificate of a notary public to the acknowledgment is made presumptive evidence of the execution of the instrument. Under this section the certificate of the notary "shall be received in all courts of this state as presumptive evidence of the facts therein certified to." In *Burbank v. Ellis*, 7 Neb. 156, it is said: "The function of an acknowledgment is twofold—to authorize the deed to be given in evidence without further proof of its execution, and to entitle it to be recorded." To the same effect are *Horbach v. Tyrrell*, 48 Neb. 514; *Linton v. Cooper*, 53 Neb. 400; *Wilson v. Wilson*, 85 Neb. 167.

It was stipulated that if J. J. Sullivan were present he would testify that he knew the signatures of the parties, and that the signatures annexed to the contract were those of Charles E. Rickley and Mary A. Armstrong. The proof is sufficient, and the instrument was properly received in evidence.

We cannot agree to the contention that the contract is void at common law, or that it is contrary to the laws of this state. The third paragraph constitutes and is a valid conveyance of an undivided one-half of the property of each to the other. The consideration was the mutual transfer and the contemplated marriage. The language of the paragraph constitutes a grant each to the other *in præsenti*. In the absence of fraud, or mistake, such a conveyance is valid.

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As to the charge of fraud, the only ground of fraud alleged is that the property which was conveyed to Mrs. Armstrong by Rickley was disproportionate in value to that conveyed to him by her. Mr. and Mrs. Rickley lived together from June 5, 1909, until sometime in 1913, and there is no evidence that during any of this time the wife ever complained of the transaction. It is difficult to tell from the evidence just what the value of the respective properties was. When the incumbrance upon the property of the wife is considered, it probably did not much exceed in value that of Rickley. At all events, there is no ground to set aside the contract as unconscionable.

It is next said that the contract did not create a joint tenancy, which would vest the estate in the survivor. Whether it created a joint tenancy or not is immaterial. We see no reason why, upon the death of one party, the property may not vest absolutely in the survivor, subject to the claims of creditors, as the contract provides. This was evidently the intent of the parties, which section 5594, Comp. St. 1922, makes it the duty of the court to carry into effect. *Sanderson v. Erverson*, 93 Neb. 606. At the time the parties executed the contract Armstrong had been following an occupation for more than 10 years. He was 40 years of age at the time of the trial. Both of the contracting parties were of mature age, each had property, the disposition of which by the law of descent and distribution, in case of the death of either, intestate, might result in depriving the survivor of comfort and support in his or her declining years. Each desired to provide for the future well-being and content of the other, a laudable and lawful desire. Such a contract is in favor of marriage and, especially in the case of persons of mature years possessing property, and having children by a former marriage, tends to prevent discord and unhappiness in the marital relation. *Rieger v. Schaible*, 81 Neb. 33; *Tiernan v. Tiernan*, 107 Neb. 563.

Both the present estate and the right of the survivor to take passed upon the execution of the contract. The con-

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tract required nothing further to be done by either party. It was executed with all the formalities of a deed of conveyance, and was such in fact. It was not an executory but an executed contract, and required no trustee to carry it into effect. *Neves v. Scott*, 50 U. S. 196; *Smith's Err. v. Johns*, 154 Ky. 274; *Collins v. Bauman*, 125 Ky. 846.

It is asserted that the contract was abandoned by the parties. It was recorded in the miscellaneous records of Douglas county in February, 1912. Both before and after the death of his wife, Rickley contributed substantially of his own funds for the repair and unkeep of the property. Other facts are in evidence which convince us that there was no intention on his part to abandon the estate conveyed, and even if Mrs. Rickley intended to abandon it, of which there is no definite proof, this could not affect a vested right of Rickley.

The judgment of the district court is

AFFIRMED.

GEORGE YOUNG, APPELLEE, V. CHICAGO, BURLINGTON &
QUINCY RAILROAD COMPANY ET AL., APPELLANTS.

FILED JUNE 27, 1923. No. 22363.

1. **Findings** of the jury, if supported by competent evidence, will not be set aside on appeal unless clearly wrong.
2. **Costs: ATTORNEY'S FEES.** The statute authorizing the taxing of an attorney's fee as an item of costs, upon a recovery for damages growing out of the shipment or delivery of freight by a common carrier, does not extend to negligence in killing animals on a railroad track or in starting fires which destroy farm property. Comp. St. 1922, sec. 5422.

APPEAL from the district court for Lincoln county:
HANSON M. GRIMES, JUDGE. *Affirmed, except as to allowance of attorney's fee.*

E. E. Whitted, J. L. Rice and John F. Cordeal, for appellants.

Hoagland & Carr, contra.

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Heard before MORRISSEY, C. J., ROSE, DEAN and DAY, JJ., BLACKLEDGE and COLBY, District Judges.

ROSE, J.

This is an action to recover damages for alleged negligence in the starting of fires and in the failure to properly fence defendant's railroad right of way. Injury to grass and land, destruction of farm property, killing of hogs on the railroad track, and labor in fighting fire are pleaded in the petition as damages aggregating \$1,523.01. Defendant denied the negligence charged and liability for damages. Upon a trial of the issues the jury rendered a verdict in favor of plaintiff for \$1,464.79. From a judgment thereon defendant has appealed.

By motion plaintiff directs attention to the fact that, since the verdict was rendered, John Barton Payne, director general of railroads of the United States, has been succeeded by James C. Davis, director general and agent of the United States railway administration. The latter is therefore substituted for the former as defendant.

The principal argument is directed to the assignment of error that the evidence is insufficient to sustain the verdict or the amount of the recovery. There is testimony in support of each item of damage included in the verdict. There is some proof indicating losses exceeding the award of the jury. While the recovery, to some extent, seems to be questionable, the conclusion that the evidence is not sufficient to sustain the verdict can only be drawn by discrediting competent testimony which the jury must have believed. The case falls within the general rule that findings of the jury, if supported by competent evidence, will not be set aside on appeal unless clearly wrong.

The allowance of an attorney's fee of \$200, recoverable as costs, is also assigned as error. Plaintiff attempts to justify the judgment therefor under the act relating to the adjustment of claims against common carriers. Comp. St. 1922, sec. 5422. The attorney's fee authorized

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by that act applies alone to professional services in controversies growing out of the transportation or delivery of freight by common carriers. *Mayhall & Neible v. Chicago, B. & Q. R. Co.*, 107 Neb. 58. It has no application whatever to any item in plaintiff's claim. Injury or loss in shipping or delivering freight is not pleaded or proved. The claim exceeds \$300 and does not fall within the terms of the statute authorizing an attorney's fee in a controversy involving a smaller amount. Comp. St. 1922, sec. 9126. Neither of these statutes can be extended by construction to the cause of action stated in the present case. There was therefore no authority for the allowance of the attorney's fee. The judgment is reversed as to that item. Otherwise it is affirmed at the costs of plaintiff in the appellate court.

JUDGMENT ACCORDINGLY.

J. H. SIMPSON, APPELLANT, v. CON HARLEY, APPELLEE.

FILED JUNE 27, 1923. No. 22413.

1. **Brokers: COMMISSIONS.** A commission cannot be collected by an agent for rejected services, if he wilfully disregarded, in a material respect, an obligation imposed upon him by the law of agency.
2. **Trusts: CONSTRUCTIVE TRUST.** "A person gratuitously or officiously assuming as agent or trustee to control or manage the property or interests of another is as firmly bound by the implied terms of his confidential relation as one who is regularly employed and paid." *Nebraska Power Co. v. Koenig*, 93 Neb. 68.

APPEAL from the district court for Antelope county:
ANSON A. WELCH, JUDGE. *Affirmed.*

Williams & Kryger, for appellant.

J. J. Harrington, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

ROSE, J.

This is an action by plaintiff to recover a broker's commission of \$2,980 for procuring a person ready, able and

willing to purchase from defendant 480 acres of land in Holt county and a lease for 160 acres of school land therein at the net price of \$22,020, or \$44 an acre for the land and \$900 for the lease. Plaintiff pleaded two contracts in writing. One was dated September 18, 1919. According to its terms he was sole agent of defendant and entitled to a commission of all the purchase price in excess of \$22,020. The other contract pleaded by plaintiff was dated September 19, 1919, and contained an agreement by defendant to sell, and by H. A. Callies to buy, the land and the lease for \$25,000, being \$50 an acre for the land and \$1,000 for the lease. In the answer to the petition defendant admitted the signing of the contracts, but alleged that plaintiff procured them by fraud which prevented the sale, made the services of the agent worthless and defeated the claim for compensation. Upon a trial of the issues the district court directed a verdict in favor of defendant and dismissed the action. Plaintiff has appealed.

It is first argued that the answer admits facts entitling plaintiff to recover compensation, that it fails to show defendant was damaged by the fraud pleaded, and that therefore there is no defense to the cause of action stated. That position is clearly untenable. The action is one to recover compensation for the services of an agent. He and his principal are the only suitors. Rights of third persons are not involved. The answer pleads in detail facts showing that the contracts on which plaintiff's right to recover is based were procured by fraud which defendant promptly denounced in addition to rejecting the services of plaintiff upon discovering his perfidy. The answer states a defense under the following rule of law:

"A commission cannot be collected by the agent for his services as such, if he has wilfully disregarded, in a material respect, an obligation which the law devolves upon him by reason of his agency." *Jansen v. Williams*, 36 Neb. 869.

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The only other question presented arises from the failure of the trial court to submit issues of fact to the jury. There was a conflict of evidence on some phases of the fraud pleaded, but undisputed proofs show conclusively that plaintiff was not entitled to recover compensation.

The testimony on behalf of defendant tended to prove that the preliminary negotiations between him and plaintiff resulted in an agreement authorizing a sale of the land for \$45 an acre and of the lease for \$1,000; that the commission was \$1 an acre for the land and \$100 for the lease, or \$580; that plaintiff inserted the false terms in the contracts and tricked defendant into signing them in ignorance of the facts. On this phase of the controversy there was a conflict in the testimony, but other evidence not disputed showed that plaintiff was not entitled to compensation. The following conclusions are properly drawn from undisputed facts:

Before defendant signed the contracts pleaded in the petition, confidential relations extending to agency and terms of sale existed between him and plaintiff. Making use of the information thus acquired, plaintiff procured from Callies the latter's signature to a contract for the purchase of the land for \$50 an acre, and of the lease for \$1,000. Plaintiff had also procured from Callies for defendant a cash payment of \$2,000. This is one of the contracts signed by defendant and pleaded in plaintiff's petition. While in possession of Callies' agreement and the cash payment of \$2,000, which belonged to defendant in the event of a sale, plaintiff afterward went to defendant September 18, 1919, and, without disclosing that Callies had signed an agreement to purchase the land for \$24,000, or \$50 an acre, and the lease for \$1,000, procured defendant's signature to the contract appointing plaintiff sole agent to find a purchaser, though one had already been found, and authorizing a commission of all the purchase price in excess of \$44 an acre for the land and of \$900 for the lease. This contract of agency

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gave plaintiff, upon his own solicitation, at least four days to procure a purchaser already procured. While the negotiations between plaintiff and defendant were in progress immediately preceding the signing of the contract of agency, both parties considered the compensation of the agent an open question and discussed it as such. At that time plaintiff, according to his own testimony, said he had priced the land and could not raise the price, but did not disclose what that price was. The day following the signing of the contract of agency, September 19, 1919, plaintiff obtained defendant's signature to the contract of purchase previously signed by Callies, without disclosing that the latter, before the contract of agency was signed, had agreed to purchase the land for \$50 an acre and the lease for \$1,000. This is the other contract pleaded in the petition. Through a conference with Callies, defendant soon learned what plaintiff, the agent, had concealed. Callies then refused to pay more than \$45 an acre and plaintiff demanded a commission of \$2,980 without regard to sale or price. With the consent of Callies, defendant refused to perform the contracts or to accept the services of the agent or to ratify the agent's acts. Defendant had received the cash payment of \$2,000 but returned it to Callies. Had defendant known in advance of Callies' agreement to pay \$50 an acre for the land and \$1,000 for the lease, neither contract would have been executed. The conclusions outlined are drawn from undisputed evidence.

It was the duty of the agent under the circumstances to disclose the facts which he concealed in procuring his principal's signature to the contracts. The failure to do so was a breach of confidential relations. His obligations in that particular did not begin with the execution of the written instruments. He had previously assumed, without authority in writing, to act for defendant in negotiating for a sale, in procuring a competent purchaser and in accepting a cash payment of \$2,000. To procure a personal advantage at the expense of defendant,

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he acted on information acquired through confidential relations previously established. If his services were legally authorized, he was bound by the law of agency to disclose what he had done for his principal. If he assumed to act as agent before he was authorized to do so, his conduct is measured by the following rule of law:

"A person gratuitously or officiously assuming as agent or trustee to control or manage the property or interests of another is as firmly bound by the implied terms of his confidential relation as one who is regularly employed and paid." *Nebraska Power Co. v. Koenig*, 93 Neb. 68.

That relation, however created, required of the agent a disclosure of the facts concerning the subject-matter of his agency. While both parties were considering the open subject of compensation during the negotiations immediately preceding the signing of the contract of agency, it was the duty of the agent to disclose that, assuming to act as such, he had procured a purchaser for \$50 an acre and received for defendant a cash payment of \$2,000. With knowledge of the facts defendant would not have signed the contracts and he was not obliged to perform either on demand of the agent. With the consent of the purchaser he had a right to reject the services of the agent and refuse payment therefor. He properly pursued this course. From a legal standpoint plaintiff gained nothing by taking advantage of information obtained from his principal in confidence to procure in writing a subsequent agreement exacting for himself the illicit fruits of silence when he should have spoken. His accountability to his principal is the same whether in abusing his trust he acted under a valid employment or officiously assumed to be an agent. The trial court made no mistake in directing a verdict. The dismissal of the action is therefore

AFFIRMED.

Chicago, B. & Q. R. Co. v. School District.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLANTS, V. SCHOOL DISTRICT ET AL., APPELLEES.

FILED JUNE 27, 1923. No. 22446.

1. **Schools and School Districts: TAXING POWER.** The taxing power of a school district is statutory and must be exercised within the terms of the legislative grant.
2. **Statutes: CONSTRUCTION.** In construing a statute, effect must be given to all its provisions.
3. **Schools and School Districts: TAXING POWER.** In 1920 a school district organized with a board of six trustees under section 6798, Rev. St. 1913, did not have power at the regular annual school district meeting to impose for school purposes taxes in excess of a 35-mill levy, without the submitting of a proposition to do so after notice and the casting of the requisite vote in favor of the proposition. Laws 1919, ch. 145, sec. 1; Laws 1919, ch. 148, sec. 1.
4. **Taxation: VOID TAX: INJUNCTION.** The collection of void taxes may be prevented by injunction.

APPEAL from the district court for Kearney county:
WILLIAM A. DILWORTH, JUDGE. Reversed, with directions.

E. E. Whitted, J. Q. Dier and J. L. Rice, for appellants.

J. L. McPheely, contra.

Heard before **MORRISSEY, C. J., LETTON, ROSE and DEAN, JJ.**

ROSE, J.

This is an application for an injunction to prevent defendants from collecting school district taxes assessed on the property of plaintiffs in Axtell school district in excess of a 35-mill levy. The plea in equity is that the school district exceeded its powers by attempting to authorize a 61-mill levy at an annual school district meeting, while the statutory limit was a 35-mill levy, which could only be increased by the adoption of a proposition to do so at a general or special election held after legal notice stating the extent of the proposed increase—steps not taken. At a meeting May 3, 1920, the school board recommended a levy sufficient to raise \$9,850. This recommendation was adopted at the regular

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annual school district meeting June 14, 1920. To raise \$9,850 the county board made a 61-mill levy on the taxable property in the school district. The burden falling upon plaintiffs amounted to \$1,619.55. They paid \$929.25 on the basis of a 35-mill levy. The difference between the two items, or the sum of \$690.30, is sought to be enjoined. The application for an injunction was resisted by defendants on the following grounds: The powers of a school district may be exercised at the regular annual school district meeting which is held at a definite time fixed by statute. All electors are required to take notice of it. The vote at the regular school district meeting was sufficient. Upon a trial of the issues the district court dismissed the suit and plaintiffs have appealed.

The school district, as one containing more than 150 children between the ages of 5 and 21 years, had been organized with a board of 6 trustees. Rev. St. 1913, sec. 6798. Did it have power June 14, 1920, to authorize the assessment of taxes in excess of a 35-mill levy without any notice except that given by statute? The law then in force, after providing a method of raising the necessary school funds, contained the following provisos:

"Provided, the amount so levied shall not exceed, in any one year, thirty-five mills on the dollar of the assessed valuation in such school district. Provided, that a levy not exceeding 100 mills may be made after submitting the proposition of the increased levy at an election called for the purpose or at any regular election, notice whereof shall have been given for at least 20 days in one or more papers published in the district or county to the qualified voters of the district, and if 60 per cent. of the votes cast at such election shall be for the proposed increased levy, the board may make the levy in such amount as may be named in the election notice." Laws 1919, ch. 145, sec. 1; Laws 1919, ch. 148, sec. 1.

The taxing power of a school district is statutory. It must be exercised within the terms of the legislative grant. The statute declared:

"Said district may, at the annual meeting, vote such sums to be raised by tax upon the taxable property of said district, as may be required to maintain the several schools thereof, for the ensuing year." Laws 1919, ch. 145, sec. 1; Laws 1919, ch. 148, sec. 1.

The provisos are limitations on the power thus conferred. The first proviso confines the revenue to a 35-mill levy and the second proviso prescribes a method of increasing it to the limit of 100 mills. The statute clearly contemplates a school district election, either special or regular, after notice, if a 35-mill levy is to be exceeded. In no other way can effect be given to every part of both provisos. In the second proviso the clause introduced by the words, "notice whereof," relates to both special and regular school district elections. At either, after notice, a proposition submitting the question of an increased levy is required. The amount of the "proposed increased levy" must be stated in the notice. This is indicated by the concluding provision: "The board may make the levy in such amount as may be named in the election notice." Compliance with the terms of the provisos is not required at a regular annual meeting as a condition of authorizing a 35-mill levy. Relying on the school district to keep within the statutory limit at the annual meeting, in absence of notice that a proposition for an increase would be submitted, electors satisfied with any levy not exceeding 35 mills would be without a pecuniary motive to attend. With notice of an election calling for a vote on such a proposition, there might be an inducement to participate, including the right to publicly oppose the increase. Notice of an election would interest electors favoring an increase. It seems clear that, without disregarding some provision of the statute, the regular annual school district meeting held in 1920, in absence of notice of a proposition to increase the levy beyond 35 mills, was without power to do so. The school district, therefore, went beyond its powers. It follows that plaintiffs were entitled to an injunction to prevent

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the collection of taxes based on the difference between a 35-mill levy and a 61-mill levy.

In *State v. Marsh*, 108 Neb. 749, though notice was not given according to statutory terms, the court said the election was not for that reason invalidated, but there was in fact an election and the notice actually given was sufficient to bring to the polls the requisite number of voters to carry the proposition submitted, if each absent elector had cast a ballot against it.

For the reasons given, the judgment is reversed and the cause remanded to the district court, with directions to allow an injunction conforming to the prayer of the petition.

REVERSED.

JOHN F. TIERNEY, APPELLEE, V. KARL F. DIETSCH ET AL.,
APPELLANTS: UNION CENTRAL LIFE INSURANCE
COMPANY ET AL., APPELLEES.

FILED JUNE 27, 1923. No. 23137.

1. **Vendor and Purchaser.** Before acquiring title, vendee in an enforceable contract to purchase land may enter into a valid agreement to sell it.
2. ———: **FRAUD.** Where a vendee, before acquiring title to land which he has legally agreed to purchase, enters into a contract to resell it, his failure to disclose the terms of his own purchase to the purchaser upon resale is not necessarily of itself a fraud upon the latter.
3. ———: **ABSTRACT: WAIVER.** A vendee in a contract to purchase land may waive the furnishing of abstracts at the stipulated time.

APPEAL from the district court for Custer county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Sullivan, Squires & Johnson, for appellants.

Kelly & Schnell and *Sullivan, Wright & Thummel*,
contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and
GOOD, JJ., BEGLEY, District Judge.

ROSE, J.

This is a suit to foreclose a mortgage on a farm in Custer county. The mortgagee, John F. Tierney, is plaintiff. The mortgagors, Karl F. Dietsch and Altha A. Dietsch, his wife, were owners of the mortgaged farm and are defendants. Other defendants have liens on the same farm. The mortgage was dated March 1, 1920, and was given to secure the payment of three promissory notes aggregating \$26,000, one for \$6,000 and each of the others for \$10,000, all due March 1, 1921. Mortgagors being in default April 28, 1921, this suit was then begun. The answer to the petition contained pleas that the execution of the notes secured by mortgage on the farm in Custer county grew out of a contract by mortgagors to purchase from plaintiff a 6,460-acre ranch in Cherry county and personal property thereon, including 910 head of live stock, farming implements and household furniture; that the contract of purchase was procured by the fraud of plaintiff; that his title failed; that there was no consideration for the notes and mortgage; that plaintiff violated the terms of this contract of sale; that mortgagors paid plaintiff \$10,000 on the purchase price; that after a short occupancy of the ranch in Cherry county they rescinded the sale for fraud and surrendered possession. The answer contained a prayer for the cancelation of the mortgage on the farm in Custer county and for the return of the money applied on the rescinded purchase of the ranch in Cherry county, less the rental value of the latter during the time mortgagors were in possession. The facts pleaded as defenses were denied in a reply to the answer. The district court, upon a trial of the issues, found the amount due plaintiff from mortgagors to be \$30,689.35, including interest, and ordered a foreclosure of the mortgage. Mortgagors have appealed.

It is argued that the notes and the mortgage securing them should have been canceled on account of fraud perpetrated by plaintiff in inducing mortgagors to purchase

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the ranch in Cherry county. This question requires a more detailed statement of the facts.

Robert S. Lee owned the ranch in Cherry county. By contract in writing April 22, 1919, he agreed to sell and J. S. McGraw to purchase it for \$113,050, payable as follows: Cash, \$1,000; June 1, 1919, \$5,000; August 1, 1919, \$9,000; each year thereafter for nine years on November 1, \$10,000; November 1, 1929, \$8,050. McGraw was entitled to a warranty deed and to possession as soon as he paid \$50,000, the remainder of the purchase price to be secured by a mortgage on the ranch purchased by him. His purchase, as evidenced by the same instrument, included personalty consisting of 910 head of cattle and horses, ranch implements and household goods. His agreement also obligated him to pay \$5,000 June 1, 1919, on the purchase price of the live stock and the remainder August 1, 1919.

Under a written agreement to perform McGraw's obligations to Lee, plaintiff, June 18, 1919, took an assignment of the contract of purchase.

Plaintiff entered into another contract June 26, 1919, to sell and "convey, or cause to be conveyed, by warranty deed" to mortgagors the ranch and personal property which McGraw had agreed to purchase from Lee. The writing was signed by plaintiff and mortgagors, the latter agreeing to pay for the ranch \$129,200, as follows: Cash, \$10,000; note for \$10,000 dated July 1, 1919, due March 1, 1920; two notes, each for \$7,500, dated July 1, 1919, due March 1, 1920; nine annual payments of \$10,000 each, due November 1, from 1920 until 1928; November 1, 1929, \$4,200. The purchase by mortgagors included also the live stock and other personalty on the terms exacted by Lee in his sale to McGraw. By means of this contract and payments made by mortgagors, the latter obtained possession of the ranch and the live stock thereon and controlled both the real estate and the personal property as their own, operating the ranch and disposing of cattle, but finally surrendering possession to

Lee upon their failure to make the stipulated payments. They made their purchase when prices were high. Payments fell due after a contraction of the currency, a fall in prices and a period of liquidation had interfered with the procuring of funds to meet maturing obligations. They were unable to pay, at the date of maturity, March 1, 1920, the three notes aggregating \$25,000, and, to procure a year's extension of time, executed three renewal notes for \$26,000, including unpaid interest, and secured them by mortgage on their farm in Custer county. This is the mortgage foreclosed in the district court on petition of plaintiff. It is from the decree of foreclosure that mortgagors have appealed.

The position of mortgagors in praying for a cancelation of the notes and mortgage may be summarized as follows: Plaintiff did not have title to the ranch which he agreed to sell. He fraudulently concealed the terms of the contracts under which he procured his equitable interest. Mortgagors entered into the contract of purchase in ignorance of the facts. The title of plaintiff failed. There was no consideration for the purchase. Plaintiff failed to perform an agreement on his part to furnish abstracts of title within a reasonable time. The purchase was properly rescinded for fraud. Is the position thus taken tenable?

Plaintiff did not pretend to have title. He made no false representation in that respect. He had a valid agreement to acquire title. He and his assignor negotiated for the ranch to profit by a resale. Lee owned the ranch and had the right to sell it on the terms specified in his contract with McGraw. There was nothing to prevent the latter from making a valid assignment to plaintiff. The transactions, contracts and evidence as a whole do not show unreasonable prices. There is no complaint that the profits on resale were unconscionable. Mortgagors knew that plaintiff did not have title, that a deed from Lee was essential to a valid transfer to them, and that McGraw and plaintiff were speculating in the

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ranch property. Plaintiff bargained to convey, "or cause to be conveyed," to mortgagors the title to the ranch. The means of doing so were created by the contract with Lee, the assignment to plaintiff and the purchase by mortgagors upon making their stipulated payments at maturity. Before acquiring title, a vendee in an enforceable contract to purchase land may enter into a valid agreement to sell it. *McNeny v. Campbell*, 81 Neb. 751. The evidence does not prove failure of title as a defense to the foreclosure of the mortgage.

Did plaintiff fraudulently conceal from mortgagors the terms on which McGraw agreed to purchase the ranch from Lee? The evidence does not tend to prove any agency, trust or other confidential relation requiring plaintiff to disclose in advance the terms upon which Lee had agreed to transfer his title. If those terms were material factors in the negotiations, mortgagors could have made disclosure a condition of their purchase. They were experienced farmers and dealers in live stock. They inspected the ranch and the cattle, understood the prices and other terms exacted by plaintiff, entered into their contract without any fraudulent inducement as to values or payments, took possession of the ranch, lived on it a year or more, recognized Lee as the holder of the title, renewed purchase money notes, sold cattle, and offered the ranch for resale at an advance in price. The better view of the evidence is that mortgagors relied on their own knowledge, skill and foresight, after inspection, and on plaintiff's ability to perform his agreement to convey, "or cause to be conveyed," the title of Lee. It may fairly be inferred from the evidence that their disappointment in completing their purchase resulted from their failure to make their payments at maturity. The record has been searched in vain to find any proof sufficient to support a finding that plaintiff fraudulently concealed the terms of Lee's contract of sale. On the contrary, there is proof that they were acquainted with

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the facts. Mortgagors, therefore, are not entitled to relief on this ground.

Did the failure of plaintiff to furnish abstracts of title within a reasonable time justify a rescission? On this issue the finding must be in favor of plaintiff. No definite time was fixed for the furnishing of abstracts. The agreement to do so was to be performed within a reasonable time. The evidence shows that Lee had title, was willing and able to furnish abstracts thereof, to execute a warranty deed in compliance with his contract of sale and to deal directly with mortgagors who had plaintiff's consent to pursue that course. They did not demand abstracts until they had been in control of the ranch and the cattle as owners for a considerable time. The abstracts were eventually furnished. Mortgagors were not injured by delay. Their failure to make deferred payments was not traceable to that source. The circumstances show a waiver of the right to require abstracts according to the letter of the contract. *McAlpine v. Reicheneker*, 56 Kan. 100; *Farmers Investment Co. v. O'Brien*, 109 Neb. 19. The plea for a rescission and for a recovery of the purchase money paid is not supported by the evidence. The deplorable losses sustained by mortgagors were attributable to the exercise of the right of contract and not to fraud.

The findings of the district court on all the issues seem to reflect the proper view of the evidence.

AFFIRMED.

HENRY DOTY, APPELLANT, V. LUTHERAN HOSPITAL ASSOCIATION ET AL., APPELLEES.

FILED JUNE 27, 1923. No. 22438.

1. **Physicians and Surgeons. NEGLIGENCE: QUESTION FOR JURY.** Plaintiff sustained a broken femur, or thigh bone, and a part of the treatment at a hospital consisted of pressure upon the fractured parts by means of a wire screen device, shaped like a legging, the pressure being adjusted by loosening or tightening straps as the condition of the leg seemed to require from time to time. The ad-

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justment of the pressure was left to the patient who was bedfast and in a badly crippled condition. *Held*, that whether the leaving of such adjustment to the patient constituted negligence was a question of fact for the jury.

2. ———: ———: ———. The broken femur, or thigh bone, of a patient of 41 years was examined, at a hospital where he was a patient, only three times by the surgeon in the course of seven weeks and a day, when he was sent home. Each examination was concluded in about ten minutes. *Held*, that whether the infrequency of the examinations constituted negligence was a question of fact for the jury.
3. ———: ———: ———. A patient with a broken femur, or thigh bone, was at a hospital for treatment for seven weeks and a day when he was sent to his home, having in the meantime contracted smallpox, which was known to the physician at the hospital who sent him away, but without informing him that he had the smallpox. Within 15 hours after he reached his home the nature of the disease was discovered and for the first time made known to him and his home was then quarantined for two weeks. Subsequently a member of his family became infected with the same disease and the home was again quarantined for three weeks. *Held*, that whether negligence was chargeable to defendants in the failure to caution the patient or to instruct him with respect to the care he should observe in his contact with his family, and others, was a question of fact for the jury.
4. ———: ———: ———. Plaintiff sustained a fracture of the femur, or thigh bone, and at the end of seven weeks and a day he was discharged from a hospital without any instructions as to the subsequent care that should be given to the injured leg. The evidence tends to prove that the fracture was improperly set at the hospital and that a normal union of the broken parts was thereby prevented. *Held*, that whether the failure to give such instructions to plaintiff constituted negligence was a question of fact for the jury.
5. **Appeal: DIRECTION OF VERDICT.** When plaintiff announced his rest in the present case, the defendants severally moved for a directed verdict and the motions were sustained. The evidence examined, and *held* that the court erred in sustaining the motions.

APPEAL from the district court for Gage county:
RALPH D. BROWN, JUDGE. Reversed.

Grant G. Martin and Bartos & Bartos, for appellant.

Rinaker, Kidd & Delehant and Reavis & Beghtol, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and DEAN, JJ., BLACKLEDGE, District Judge.

DEAN, J.

Plaintiff sustained a fracture of the femur, or thigh bone, of his left leg about midway between the knee and the hip, and other minor injuries to his head and face, caused by the overturning of an automobile, owing to a defect in a highway, at a bridge approach. When the car turned over, plaintiff was thrown to the bottom of a ditch which was about 22 feet deep. He was immediately taken to the defendant Lutheran Hospital Association at Beatrice for treatment. Plaintiff alleges that the defendant hospital and the defendants Dr. Hepperlen and Dr. Brown "were and are now jointly engaged in the general practice of medicine, surgery and nursing and working together in the establishment, maintaining and conducting of a public hospital for the nursing, medical and surgical care of the sick, injured and afflicted;" and that, after defendants were employed by him, the medical treatment and attention given him was "negligent, careless and unskilful," to his damage in the sum of \$20,000. In their respective separate answers defendants denied generally the averments of the petition and each specifically denied plaintiff's allegations which charged carelessness, negligence, lack of skill, and the like.

When plaintiff concluded the introduction of his evidence, the defendants separately moved for a directed verdict on the ground, as alleged, that plaintiff "failed to introduce sufficient evidence to make a *prima facie* case in his favor and against the several moving defendants." The motions were sustained. Thereupon the jury, pursuant to the court's instruction, returned a verdict in favor of the defendants and each of them. Plaintiff appealed.

It was on the day of the accident that plaintiff was

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taken to the defendant hospital for treatment and for about five days thereafter he was unconscious. Subsequently his injured leg was bandaged with cotton which was held in place by a circular screen made of light wire, in shape and form like an ordinary legging, the pressure on the leg being adjusted by straps and buckles. Plaintiff testified that Dr. Hepperlen advised him that if the pressure of the screen device hurt him he should loosen the straps, "and if it don't hurt you buckle them up a little tighter," he says, "I leave that to you." He also testified that adhesive straps were used which reached "above the knee cap down over the foot," and that a weight was attached that "pulled a little on it," that he was confined in the hospital seven weeks and a day and during all of that time he saw Dr. Hepperlen almost every morning, but that his limb was examined only three times, for about ten minutes each time, and that Dr. Hepperlen was the doctor who made each of the examinations.

It has been held that a physician is not chargeable with negligence where intervals elapse between his visits when the patient requires no attention during such intervals, but that he is chargeable with negligence where, during such intervals, the patient requires attention. *Tomer v. Aiken*, 126 Ia. 114.

Continuing plaintiff testified that the broken ends of the bones were not placed in apposition at the hospital but were so placed that one broken end lapped over the other broken end, which shortened the leg about two inches and caused it to be crooked and bow shaped, and that a lump was thereby caused to appear on the front of his leg; that he called attention of the nurses to the lump which was about the size of a goose egg, and that Miss Gerding, the head nurse, and some of the other nurses under her were present, and that one of them said, "That is all right, the doctor will take care of that. I could not tell you anything about it, the doctor will attend to that part of it," that subsequently he asked Dr.

Hepperlen what caused the lump, and the doctor said, "I don't know, we will look after that tomorrow." That was the day that they came in and took the bandage off."

Plaintiff also testified that defendant Dr. Brown examined his jaw, which gave him great pain, for what was believed at the time to be a fracture, and he advised plaintiff that when he was able he would be taken into the X-ray room and they would find out the trouble, but that the jaw bone was given no further attention; that after he had been at the hospital about six weeks bed sores developed; that a few days afterwards, when the nurse gave him his shaving utensils and a looking glass, he, for the first time, discovered that blotches had broken out on his face, and when he asked the nurse what the blotches were she said she did not know but that she would call Dr. Hepperlen. When the doctor came to his bedside he said, "That is a breaking out caused from your stomach," he says, "That will be all right in a day or two;" that the next day, or about that time, Dr. Hepperlen told plaintiff that he had to go home; that he protested that he was ill and unable to leave his bed and could not place his foot on the floor and was in no condition to be moved, but the doctor said he must go; that the next day, over his protest, the attendants and nurses dressed him and, the hospital authorities having caused notice to be sent to his wife, he was wheeled out of the hospital on a chair to a truck, where his wife and a man from his neighborhood were in waiting, and under such conditions was sent to his home at Vesta, in Johnson county, 27 miles distant; that, about 15 hours after he was carried into his own house, a physician was sent for and it was discovered that the blotches on plaintiff's face and person disclosed smallpox; that his home was then quarantined for about two weeks, but not until after perhaps 50 friends and neighbors in his home community had called upon him; that, when he recovered and the quarantine was raised, almost immediately one

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of his five little ones was stricken with the same malady and the home was again quarantined for about three weeks, or in all about five weeks; that neither Dr. Hepperlin nor the head nurse nor any other person at or connected with the hospital told him or his wife, when he left the hospital, that he had the smallpox and that he did not find it out until informed by a doctor after he arrived at his home.

Two physicians testified that a person becomes infected with smallpox about 14 days after exposure; so that it appears from the evidence that plaintiff acquired the disease while he was a patient at the hospital, but whether plaintiff became infected by the negligence of the defendants or any of them does not appear in the evidence.

That one or more at the hospital knew that plaintiff was so afflicted appears from the evidence of Dr. Ziegler, who testified that, just before plaintiff was sent from the hospital, Dr. Hepperlen telephoned him that "Doty was ready to come home and had the smallpox," and that if he did not go home he would be taken to the pest house. But plaintiff was sent to his home without being told that he was afflicted with a loathsome and contagious disease, and, of course, without any directions or necessary precautions respecting his own safety and the safety of his family and others with whom he would naturally come in contact. Whether negligence was shown was a question of fact for the jury. 30 Cyc. 1574.

That the smallpox was communicated by plaintiff to only one person, a daughter, so far as the record shows, was not due to the defendants' foresight. It may be added, however, that if plaintiff was put to any expense for medical treatment or otherwise, in this behalf, it is not made to appear in the bill of exceptions.

He also testified that when he left the hospital none of the doctors or nurses gave him any instructions about taking care of his injured leg which, up to the time of the trial caused him great and constant pain. It also appears from his evidence that when he walks he has to

keep one leg straight and the other bent, and when in bed he cannot turn over without taking hold of the broken leg and raising it, which causes great pain; that for more than six months after leaving the hospital he went about on crutches and subsequently used a cane. and that at the time of the trial the condition of the leg was practically the same as when he left the hospital.

Dr. Ziegler, of Vesta, testified that he took plaintiff to the defendant hospital shortly after the accident, but that he had nothing to do with setting his leg. With respect to plaintiff's treatment at the hospital the doctor testified that adhesive straps and bandages and weights were used, with sand bags at both sides of the fractured leg to support it; that he examined plaintiff's leg soon after he returned from the hospital and found there a hard lump, which he called a callus; that some fractures of the femur, or thigh bone, require more attention than others, but that in a case like plaintiff's it should be looked after every few days or at least once a week, and that he told plaintiff he should not use his leg for about four weeks. But on the cross-examination the doctor said that when he made the examination plaintiff's leg was in good condition, "that is, like it should be at that stage of the game," and that he found no lump there and nothing unusual or out of the ordinary. He was asked if the limb was shortened, and he said that he did not measure it, but that "there didn't seem to be, no nothing unusual about it." Nevertheless, the X-ray pictures, and the evidence of the doctor who developed them, which follows, all corroborate plaintiff's evidence with respect to improper setting and with respect to the lump and the bend or arch in the leg.

The surgeon who took the X-ray pictures testified: "Q. Now, doctor, you said that in treating the—reducing one of those fractures, that a weight is to be hung on; the sole purpose of that weight is to draw the ends so that the contraction of the muscles will not bring the ends past one another, isn't that it? A. That's the idea.

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Q. In other words, the purpose of that is to get the parts of the bone here, as shown in this picture, to come and form into line and not slip past one another, as shown here? A. Yes. Q. That is a fact, isn't it? A. Yes."

It is elementary that such circumstances as are depicted in the foregoing evidence constitute questions of fact bearing on negligence or lack of skill which should be submitted to a jury. *Hickerson v. Neely*, 21 Ky. Law Rep. 1257; *Beck v. German Klinik*, 78 Ia. 696; *Rogers v. Kec*, 171 Mich. 551.

Another physician testified that he seldom let a fracture go more than a week without looking at it, and that sometimes the thigh bone when broken half way between the knee and the hip never unites, while some unite in two months and some in four or five weeks because the bone is large; that a doctor by examination can tell whether the bone will knit; that the open method, that is, cutting into the bone, and the Buck's extension and the double incline are all proper treatments and were customarily used in the vicinity of Beatrice in 1918. In explanation of the "open method" the doctor testified: "Where we are unable to obtain the apposition of the bones we open **them**, **open down** to the fracture and put on a Lane plate securing the plate with two or three holes in it, after the bones are put in apposition, securing the Lane plate down into the bones to hold them in position." But in the present case it appears that the "open method," as outlined by the witness, was not used.

Plaintiff testified that he was 41 years of age when the accident happened and was then a healthy and able-bodied man of unusual strength; that at times appropriate to the required work, he ran a threshing machine, a corn sheller and a wood saw, and at odd times worked in a garage, but that when the trial was on he could not do that sort of work but for the most part was confined to the performance of work which he could do while seated. From his evidence it also appears that before the injury his income averaged about \$1,400 a year and about

\$750 thereafter. Much of plaintiff's material evidence was corroborated by his wife and sister with respect to the injuries, the treatment and the like.

The argument that there is evidence that should have been submitted to the jury appeals to us. Among such evidence reference may here be had briefly to the following which tend to establish plaintiff's contention of negligence and malpractice, namely, that of the X-ray pictures and that of the surgeon by whom they were developed; that plaintiff in his crippled condition was left to regulate the adjustment of the pressure of the screen device upon his leg; that the fractured leg was examined only three times in a period of seven weeks and one day; that when plaintiff was discharged he was given no instructions about the treatment or the care of his broken leg; that Dr. Hepperlen knew that plaintiff had the small-pox when he was sent away from the hospital but did not reveal that fact to him; and whether the evidence shows, or fails to show, that plaintiff's limb was treated generally in a negligent, careless and unskilful manner, and whether the "open method" treatment should have been employed, were all material questions of fact, bearing on negligence and lack of skill, which should have been submitted to the jury.

The defendants contend that there is apparently no serious claim by plaintiff that any of the evidence tends to implicate either the Lutheran Hospital Association or Dr. Brown "under the allegations of the petition." Plaintiff does not concede the contention of the defendants on this point, but calls attention to the allegations of his petition, a portion of which appears in the first paragraph of this opinion. Inasmuch, however, as the case must be remanded for a trial on the merits, we do not find it necessary at this time, in the present state of the record, to decide the question of liability among the several defendants.

In its answer the defendant hospital admitted: "That on February 24, 1918, it was, ever since has been, and

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still is a corporation duly organized under the laws of the state of Nebraska with authority to establish, maintain, and conduct a hospital for the accommodation, nursing, healing, and the medical and surgical care of the sick and afflicted, irrespective of race, sex, color, religious belief, or pecuniary circumstances, and to conduct a school for the education and training of nurses."

It may be added that two exhibits are in the record, one of them a bill against plaintiff, dated April 14, 1918, by the Lutheran Hospital Association for board, medicine, dressing and laundry, amounting to \$75.25, and another bill for services in setting plaintiff's leg in the sum of \$50, dated August 1, 1918, the latter being apparently on a bill-head of Dr. Hepperlen, Dr. Brown and two other physicians. But the bills are not, of course, conclusive on the question of whether the liability is joint or several.

The court erred in directing a verdict for defendants. The judgment is reversed and the cause remanded for a trial on the merits.

REVERSED.

SAM CURA V. STATE OF NEBRASKA.

FILED JUNE 27, 1923. No. 23208.

1. **Intoxicating Liquors: UNLAWFUL POSSESSION: SUFFICIENCY OF EVIDENCE.** Defendant was convicted under the state prohibitory law of unlawfully having in his possession certain stills for the manufacture of intoxicating liquor, 61 gallons of whiskey and 31 barrels of mash. The evidence examined, and *held* that the verdict is amply supported by the evidence.
2. **Criminal Law: MOTION FOR NEW TRIAL.** Where two or more defendants were informed against jointly, and both were convicted and separate motions for a new trial were filed, and the motion as to one defendant was sustained and as to the other it was overruled, *held*, that, the motions being separate, the defendant whose motion was overruled cannot predicate error upon the court's ruling.

ERROR to the district court for Douglas county:
CHARLES LESLIE, JUDGE. *Affirmed*.

Claudio Delitala, for plaintiff in error.

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O. S. Spillman, Attorney General, and Lee Busye, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN and GOOD, JJ., BLACKLEDGE, District Judge.

DEAN, J.

Sam Cura and Joe Pattavina were informed against under the prohibitory law of the state in the district court for Douglas county. In the first count of the information they were charged with the unlawful possession of a still; in the second count with the unlawful possession of mash and material to be used for making intoxicating liquor; and in the third count with the unlawful possession of intoxicating liquor manufactured by them for sale. The jury found both defendants guilty on all counts. Both defendants filed separate motions for a new trial. Pattavina's motion was sustained and subsequently the suit was dismissed as to him and he was discharged. Cura's motion was overruled and he was sentenced to serve 30 days in the county jail and to pay a fine of \$600 and costs of suit. Cura prosecutes error from the denial of his motion for a new trial.

When this action was begun Sam Cura and wife, with their three children, lived in a story and a half frame house at No. 1352 South Twentieth street, Omaha. The house has five rooms down-stairs and a large room up-stairs with a light partition in one end.

Frank Williams, a sergeant of police, testified that June 1, 1923, he went with officers Sullivan, Nelson and Wade to defendant's residence about 8 o'clock in the evening and, under command of a search warrant, proceeded to search the house: that on entering he "smelled the mash" and, opening a door, went directly up-stairs where they found three stills, 31 barrels of mash and 61 gallons of whiskey: that the stills were operated on coal stoves with a coil attachment which ran down through a water-barrel, the whiskey coming out at the lower end of the coil: that fires were burning in the stoves at the

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time and the stills "were running whiskey;" that they arrested both defendants, "called the patrol wagon and sent the stills and liquor and the two men in;" that kerosene was stirred into the mash and it was destroyed; that only the lower part of the house was occupied as a residence by the Cura family and there was nothing up-stairs except the stills, the stoves, the mash and the whiskey; that the only way to get to the room where the liquors and paraphernalia were found was through the kitchen in the back part of the house by a stairway; that the defendants were in the kitchen when the officers arrived and, upon inquiry, they denied ownership.

The evidence of the sergeant with respect to finding the "three stills in operation" and the 31 barrels of mash and the 61 gallons of liquor was corroborated by Officer Nelson. He added that they discovered "pails, funnels, and buckets," and that the liquor was "corn whiskey." Officer Sullivan corroborated the evidence of the sergeant and in addition testified that there was no furniture up-stairs.

Defendant Cura testified that he rented the house from the owner for \$40 a month; that it had five rooms down-stairs and one up-stairs; that his family occupied the lower floor and, May 2, 1922, his wife rented the room up-stairs, unfurnished, to a man named Joe Bedra, whom he never saw but once, for \$2.50 a week; that he never went up-stairs after the room was rented, but heard some one moving about the night that Bedra moved in. He admitted that to get the stills, barrels, jugs, stoves and fixtures up-stairs they would have to be carried through the kitchen, but that he never saw Bedra or any other person carry them up and never went up-stairs to see what was going on. He testified that his co-defendant Pattavina was at his house on the afternoon and evening of the arrest, with his family, visiting; that he saw him two or three times a week; that he was sure Pattavina was not operating in the attic; that he never smelled any mash about the house from the first of May to the first of

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June; that he knows the odor of strong liquor but never discovered it in his house; that he talked to Bedra in his kitchen about a week after he got the room and he told him where he worked and that was all; that he does not know where Bedra is, but looked for him and could not find him and did not know where he was June 1.

Mrs. Cura testified that she had no knowledge of anything being up-stairs or that any person ever took any of the paraphernalia to the room that was found there by the officers; that she never was up-stairs after she rented the room to Bedra; that she never discovered the smell of mash about the house and did not know that stoves and stills were in active operation, nor that they were in the house, when the officers came.

Joe Pattavina testified that he and his wife and child visited at Cura's house once or twice a week. He denied any knowledge of the liquor, the stills, the stoves and the paraphernalia which the officers found in the attic. He testified: "When I go out there (to Cura's), stay two or three hours and I never smell nothing; that day I was over there afternoon, supper and dinner." On the cross-examination Pattavina testified that the reason for not working the day he was arrested was because he was not feeling well; that he never saw Bedra at Cura's house and that he was never in the attic.

Counsel for defendant argues: "Under the evidence * * * the main question for determination by the jury should have been whether or not Sam Cura and Joe Pattavina, or either of them, were in control of the premises on which the violation of the law was taking place: because, if it was true that the second floor had been rented, and this was entirely for the jury to determine, then Sam Cura would not have been guilty as charged." Counsel, in the belief that the jury should have been so instructed, tendered an instruction substantially to that effect. The court did not err in refusing the tendered instruction.

We think that it would serve no good purpose to take

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up time and space in discussing the evidence at length. It speaks for itself. The verdict seems to respond in every material respect to the great weight of the evidence. The jury were plainly instructed, *inter alia*, that before the defendants could be found guilty the state must prove beyond a reasonable doubt that they had in their possession either the equipment, or the mash or the intoxicating liquor which was set forth in the respective counts of the information. And this was found by the officers at Cura's residence in a room in which there was no furniture. If the evidence of the defendants had been accepted by the jury the verdict would, of course, have been for acquittal. But the jury, as triers of fact, *inter alia*, determined the credibility of the witnesses and it did not accept defendant's version of the facts. And we do not see how the jury, in the performance of its sworn duty, could have returned any other verdict. Comp St. 1922, sec. 10186.

Counsel very properly filed separate motions for a new trial for each defendant and now contends that the court erred in refusing to sustain Cura's motion. The argument is that a motion for a new trial is indivisible, and that if Pattavina was entitled to a new trial Cura should also have been granted a new trial. In support of his contention he cites *Dutcher v. State*, 16 Neb. 30. The citation is not in point because three defendants there moved jointly for a new trial and the adverse ruling was based on the ground that a separate motion was not filed in behalf of the defendant who alleged error. To the same effect is *Long v. Clapp*, 15 Neb. 417. In the latter case it appears that the motion reads in part: "And now on this day come said defendants and separately move the court for a new trial." This was followed by the court's terse observation: "But the use of these words does not alter the fact nor make that two motions which was but one"—citing *Dunn v. Gibson*, 9 Neb. 513. The court did not err in overruling Cura's motion.

The record is without reversible error. The judgment is
AFFIRMED.

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JOHN DAILY, APPELLEE, v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, APPELLANT.

FILED JUNE 27, 1923. No. 22433.

1. **Carriers:** TRANSPORTATION OF LIVE STOCK: LIABILITY. "When live stock, unaccompanied by a caretaker, is received by a railroad company in good condition and is delivered later to the consignee in a damaged condition, a *prima facie* case is made against the railroad company by reason of a presumption that the damage resulted from some cause other than one which would exempt the company from liability. *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.*, 105 Neb. 151.
2. ———: ———: ———. A railroad company is not generally held liable for injuries to live stock due to a condition of pregnancy unless it has actual or constructive knowledge of this fact. In the absence of such knowledge, the condition will be regarded as a hidden or concealed defect, and the company will not be charged with greater care than that ordinarily exercised in handling animals not pregnant. But where the fact that the animal is in a pregnant condition is plainly apparent to the railroad company, or where it is in possession of facts that would lead a reasonable person to infer this condition, then the company will be liable for injuries due thereto, and caused by its negligence in not handling the animal with due care under the circumstances, though not expressly informed of the fact by the shipper.
3. **Constitutional Law:** COSTS: ATTORNEY'S FEES. Section 9126, Comp. St. 1922, providing for an attorney's fee to plaintiff's attorney, upon claims against any person or corporation doing business in this state, *held* to allow recovery in the nature of reimbursement of costs, and not unconstitutional as providing a penalty in favor of an individual.
4. **Evidence** examined, and *held* sufficient to sustain the verdict.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

Wymer Dressler, Robert D. Neely and Paul S. Topping,
for appellant.

Murphy & Winters, contra.

Heard before DEAN, ALDRICH and DAY, J.J., COLBY,
District Judge.

ALDRICH, J.

This is an action at law to recover damages for the loss

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of one cow and injury to another, which plaintiff alleged was caused by negligence of the defendant railway company in handling and taking care of the shipment. As a defense defendant alleged that if any of the cattle and calves were injured, crippled, or died while in transit, such injury and death was due to the inherent nature, disposition and propensities of the animals to injure themselves and each other, and not due to any negligence on the part of defendant. Further answering, defendant alleged that plaintiff was negligent in shipping the cow, which was killed by the humane officer at Sioux City, Iowa, due to the fact that the cow was with calf at the time of shipment; that the animal was killed by the humane officer acting under the authority and direction of the law of the state of Iowa, and through no fault of defendant. Plaintiff replied by way of general denial, with an admission that the humane officer killed the missing animal after she was injured. The case was tried to a jury, resulting in a verdict and judgment for plaintiff in the sum of \$143.85, and in addition the sum of \$50 was allowed by the lower court as attorney's fees. Motion for new trial was overruled, and defendant appeals.

Appellant assigns four errors, which are as follows:

- (1) The verdict is not sustained by sufficient evidence.
- (2) The court erred in giving to the jury instruction No. 10 on its own motion.
- (3) The court erred in giving to the jury instruction No. 11 on its own motion.
- (4) The court erred in assessing an attorney's fee in the sum of \$50 against defendant.

The shipment originated on June 15, 1917, in St. Paul, Minnesota, destined for Omaha, Nebraska, and consisted of 24 head of cows and 8 head of calves. When the cattle arrived at the stockyards in Omaha, one of the cows was missing and another badly crippled. The crippled cow was sold to the packers in Omaha for \$65, her value for dairy purposes being \$100 or \$110, according to plaintiff's testimony.

The record discloses that the missing cow was found in

the chute by the humane officer at Sioux City, Iowa. She had been removed from the car and was nearly dead, was calving at the time, and was trampled and torn. There was but a partial delivery of the calf and, the condition of the cow warranting it, the humane officer shot her. He testified that she had been down in the car and trampled by other cattle, but could not tell whether trampled when lying in the car giving birth, or prior to delivery, and thereby causing premature birth. He stated that the excitement and hardship of shipment often causes cows heavy with calf to give birth prematurely.

Defendant produced all the records of the train crew, none of which showed notations of rough handling. In fact the record of Conductor Hennessy did not show a notation of rough handling from June 10 to June 20. This evidence is not sufficient to establish the defense, as we will hereinafter demonstrate.

With reference to the presumption in this class of cases the rule in this state is as follows:

"When live stock, unaccompanied by a caretaker, is received by a railroad company in good condition and is delivered later to the consignee in a damaged condition, a *prima facie* case is made against the railroad company by reason of a presumption that the damage resulted from some cause other than one which would exempt the company from liability." *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.*, 105 Neb. 151; *Church v. Chicago, B. & Q. R. Co.*, 81 Neb. 615; *Chicago, B. & Q. R. Co. v. Slaterry*, 76 Neb. 721.

Plaintiff had been in the business of trading in live stock, milch cows and feeders, and dairy stock generally, for 27 years. In other words he was evidently a competent and discriminating judge of this class of live stock. He bought the cattle in question in St. Paul and personally examined each individual animal a short time before they were loaded. The shipment of which the injured cows were a part consisted of 16 cows heavy with calf (due to calve in a month or six weeks), and 8 had young calves.

Defendant had shipped hundreds of similar cows from St. Paul to Omaha, and, so far as the record shows, never had a loss. In order to pick cows which could be shipped safely, he took precautions to allow two or three weeks after they arrived at Omaha for them to become fresh. The cattle were delivered to the defendant company in good shape, so far as the record shows, and arrived at Omaha with one cow missing and another injured, as alleged in the petition.

Under all the facts and attendant circumstances the jury were justified in finding that defendant was negligent and their verdict is supported by sufficient competent evidence. The presumption of negligence on defendant's part in handling this shipment of cows is not rebutted by evidence introduced in its behalf. The train records and notations of no rough handling are entitled to but little weight or probative force because they were confined to the breaking of, or some actual damage done to, some part of a car, or the uncoupling of a car. There could be much rough handling amounting to negligence on defendant's part without obtaining any one of these results which would injure cows not pregnant. Whether or not the cow gave premature birth because of rough handling while being shipped in defendant's car was a question properly for the jury, and, there being ample and sufficient evidence to sustain it, their verdict will not be disturbed by this court.

Instruction No. 10, given by the court on its own motion, is as follows:

"The defendant claims that the death of the cow shot by the humane officer at Sioux City was brought about through the negligence of the plaintiff, and claims that said cow was in such condition with calf that an ordinarily prudent person would not have shipped it.

"The burden of proof on this proposition is upon the defendant, and if you find from a preponderance of the evidence that the plaintiff was guilty of negligence in shipping the cow in question, owing to its physical con-

dition, and you further find that the necessity for shooting the cow at Sioux City was the result of such negligence of the plaintiff, not contributed to any extent by negligence of the defendant, then your verdict should be for the defendant with reference to this cow.

"In this connection you are instructed that the defendant was bound to exercise reasonable care to protect the animals from any form of violence or improper handling which would tend to injure same, but would not be liable for any injuries resulting merely from the ordinary and proper operation of the train."

Instruction No. 11 is as follows:

"Defendant is not liable for the act of the humane officer in killing the cow in question unless the necessity for such killing was brought about by negligence of the defendant; if you are satisfied by the evidence that the necessity for killing the cow was due solely to the fact that it was with calf and could not stand the ordinary conditions of the trip, and not contributed to by any negligence of defendant, the defendant would not be liable therefor."

We have quoted these two instructions in full to show that the theories of both litigants were properly submitted to the jury for consideration and determination. The two instructions questioned, and all the instructions in general, are substantially correct and are without reversible error.

The following quotation demonstrates the correctness of the instructions and their applicability to the facts:

"The carrier is not generally held liable for injuries to animals due to a condition of pregnancy unless it has actual or constructive knowledge of this fact. In the absence of such knowledge the condition will be regarded as a hidden or concealed defect, and the carrier will not be charged with greater care than that ordinarily exercised in handling animals not pregnant. But where the fact that the animal is in a pregnant condition is plainly apparent to the carrier, or where it is in possession of

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facts that would lead a reasonable person to infer this condition, then the carrier will be liable for injuries due thereto, and caused by its negligence in not handling the animal with due care under the circumstances, though not expressly informed of the fact by the shipper. In one of the cases announcing this principle it is said: 'It would certainly be most unreasonable to require shippers of live stock to seek the agent of the carrier and make known the physical condition of his stock, and for failure to do this discharge the carrier from all liability for negligence. As well require each passenger, upon purchasing his or her ticket, or upon boarding the train, to make known his or her physical condition, so that the carrier might exercise more care in running the train to avoid collisions or accidents from other causes.' 4 Elliott, Railroads (3d. ed.) secs. 2338, 2339.

With reference to the fourth assignment, appellant contends and argues that the assessing of an attorney's fee, under the provisions of section 9126, Comp. St. 1922, was error, because the statute is unconstitutional in allowing a penalty upon a railroad company in favor of an individual, and in denying equal protection and due process of the law within the meaning of the Fourteenth amendment to the federal Constitution. This court has repeatedly held that attorneys' fees provided for in this manner by statute are in the nature of costs and may be properly allowed. *Smith v. Chicago, St. P., M. & O. R. Co.*, 99 Neb. 719; *Marsh & Marsh v. Chicago & N. W. R. Co.*, 103 Neb. 654; *Robertson v. Chicago, B. & Q. R. Co.*, 108 Neb. 569; *Mayhall & Neible v. Chicago, B. & Q. R. Co.*, 107 Neb. 58; *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.*, 105 Neb. 151.

In view of the foregoing discussion and citation of authority, the judgment of the district court is in all respects affirmed.

An attorney fee of \$50 is allowed plaintiff in this court.

AFFIRMED.

State, ex rel. Bishop, v. Liston.

STATE, EX REL. BLANCHE BISHOP, APPELLEE, V. CHARLES
A. LISTON, APPELLANT.

FILED JUNE 27, 1923. No. 22457.

1. **Bastardy.** A preponderance of the evidence is all that is necessary to sustain the verdict of a jury in a bastardy proceeding.
2. **Evidence** examined, and *held* sufficient to sustain the verdict.

APPEAL from the district court for Hayes county:
CHARLES E. ELDRED, JUDGE. *Affirmed.*

Beeler, Crosby & Baskins and Stewart, Perry & Stewart,
for appellant.

Halligan, Beatty & Halligan, contra.

Heard before MORRISSEY, C. J., ALDRICH and DAY, JJ.,
COLBY and REDICK, District Judges.

ALDRICH, J.

This is a bastardy proceeding brought in Hayes county upon the complaint of Blanche Bishop against Charles A. Liston, defendant. Hearing was had in county court and defendant was bound over to the district court. The trial resulted in a verdict finding defendant guilty as charged in the complaint. Motion for new trial was overruled and judgment entered allowing complainant the sum of \$3,063 for maintenance of the child, to be paid quarterly in installments covering a period of 15 years. Defendant appeals.

On the 21st day of April, 1921, there were bastardy proceedings held in the county court of Hayes county on complaint of one Blanche Bishop, appellee herein, charging one Charles A. Liston, defendant, with being father of her unborn child. Evidence was submitted on part of appellee and defendant. The first witness offered to sustain the charge was the appellee, Blanche Bishop. She told a story, plain, unequivocal, and without attempting to be unduly prejudicial, and in the main was corroborated in detail by other witnesses of respectable character. The first detail describes how defendant sought the ruin of the appellee and when it was accomplished. Medical men were called to detail and describe the period of gestation

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and they agreed and fixed the time at 280 days. The birth of the child in question corroborates this statement.

The defendant is a ranchman owning extensive cattle interests and has a large and paying ranch. The appellee's father worked for him and resided near the Liston ranch. He noticed her condition and suspected who was the author of it, and upon the birth of the child, Blanche Bishop, the appellee, swore out a complaint against the defendant charging him with her seduction. She was unmarried. Defendant had a family consisting of a wife and one son. On the night of September 5, 1920, defendant broke into the bedroom where the appellee was sleeping, entering the same by breaking open a window.

The defense claims that the window was newly painted and stuck and could not be opened, when the evidence was that defendant pushed the window open. The man who did the painting was called as a witness on behalf of defendant, and on cross-examination testified the paint did not stick to the window but it was stuck when he came to do the painting. Anyhow, the appellee testified as to the condition of the window on the night of September 5, and this repudiated defendant's theory. The jury believed what the girl said and disbelieved the witnesses called against her. It suffices to say that the complainant's story is corroborated by every physical fact and circumstance in the case and the jury's verdict is the only one that could be arrived at under the evidence.

The defendant told his neighbors that, had Blanche Bishop come to him, he would have fixed matters and there would have been no trouble.

Appellant in his brief complains because of alleged contradictions in complainant's testimony, but we submit that there is not a single contradiction in a material point in her testimony. The screen, it is true, which was at the window is not before this court, and we submit that the examination of the screen, made at the time it was displayed to the jury at the trial of this case, showed that

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it had either been fastened by hooks or nails, or, as related by the complainant, from the outside. There was a stop on the inside of the screen, but there was no testimony that the stop was in place or that it was caught on the night in question. Mrs. Liston testified that the stop in the window was so tight that she had to use a pair of pliers to pull it out. An examination of the screen however showed that the stop was perfectly loose, and Mrs. Liston, thereupon, in an attempted explanation of her testimony stated that she used the pliers as a matter of convenience, and not of necessity, as she first testified. An examination also proves that, on account of weakness of the spring in the stop when it was pulled up, it did not go back in place without being pushed in. We submit that the testimony of the girl as to how the screen was fastened is practically undisputed in the record of this case. This is a question of fact largely, and the verdict will not be disturbed upon the evidence introduced if the same is apparently true.

A preponderance of the evidence in this case is all that is necessary and the verdict of the jury will be sustained where there is evidence to support the same. This rule of law was followed in *Olson v. Peterson*, 33 Neb. 358, and *Strickler v. Grass*, 32 Neb. 811; and, also, in the well-considered case of *Parrish v. Hodges*, 98 Neb. 403. Also in *Walton v. Carroll*, 106 Neb. 138, the same doctrine is reiterated. Also in *Martin v. Leininger*, 103 Neb. 448, we find a reiteration of the same doctrine. We consider, then, this to be the law in Nebraska on this proposition.

Complaint is made on the part of defendant that appellee was allowed to testify as to the fact that she told Mrs. Stoetzel, the following morning, what had happened between her and the defendant. It was not error for this testimony to be allowed. *Oleson v. State*, 11 Neb. 276; *Welsh v. State*, 60 Neb. 101; *State v. Meyers*, 46 Neb. 152. As for that matter outside cases can be cited which hold this theory also. On this point see *Totten v. Totten*, 172 Mich. 565; *Gardner v. Kellogg*, 23 Minn. 463. This establishes the law on this proposition in this jurisdiction and

others. This matter that she told Anna Stoetzel that she had intercourse on the night before was brought out in the first place by defendant himself, and not by appellee.

It should be further noticed that all the medical experts testifying say that the baby should be born the 28th or 29th of May, 1921, if the act of intercourse took place on September 1, 1920, and such was the case as a matter of fact. All the evidence sustains the fact of defendant's sexual intercourse with the complaining witness and that is sufficient. Modern cases along this line are *Martin v. Leininger*, 103 Neb. 448; *Torske v. Johansen*, 104 Neb. 378; *Walton v. Carroll*, 106 Neb. 138. These, according to Nebraska authority, sustain the girl by the overwhelming weight of authority of the law, and such is the law.

Again we repeat the proposition, in a bastardy proceeding all that is necessary is to have a preponderance of the evidence as appears by authority. The testimony all shows and the argument of counsel sustains the proposition of the truthfulness of the complainant.

The case of *Hutchinson v. State*, 19 Neb. 262, in regard to the sufficiency of the evidence, dealt with a situation where there was but one act of intercourse. The period of gestation was 304 days, about 20 days longer than the normal period. Testimony of a number of experts was taken, and it was shown that, while the probabilities were against the complainant therein, yet they were not conclusively so. In the opinion it was said: "Pregnancy would probably follow from the intercourse testified to under the circumstances shown to have existed, and that the period of gestation was not extended beyond what medical science and experience proves to be possible. These questions were properly submitted to the jury under proper instructions. They were fully and carefully examined. Physicians of high standing in their profession were before the jury, and, in the main, supported the testimony of the complainant (although somewhat conflicting), to the extent that the facts of which she testified were not impossible. We cannot say that the verdict was

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not supported by sufficient evidence."

The jury has already found that the period of gestation was as detailed by complainant. It should be noted here that: "A judgment will not be reversed upon the ground that the verdict is against the weight of evidence where the testimony is conflicting, if there is sufficient evidence to sustain the verdict." *Hutchinson v. State*, 19 Neb. 262.

As a matter of law the mother of the child is a competent witness in a case like this. Without doubt the act of sexual intercourse has been amply and abundantly proved. The conviction is sustained by the law and the fact.

Other propositions are urged by appellant which we do not consider necessary to discuss herein. We have carefully reviewed the law and all the facts in connection with this case. The instructions given by the lower court were substantially correct and were without reversible error. They reflect the law governing this class of cases and correctly and comprehensively inform the jury as to its application to the disputed question of fact submitted for their determination.

In view of the foregoing discussion the case is affirmed. The judge and jury found the law and facts correctly and should not be reversed.

AFFIRMED.

SIEBERT M. THOMPSON, APPELLEE, v. JAMES C. DAVIS,
DIRECTOR GENERAL, APPELLANT.

FILED JUNE 27, 1923. No. 22499.

1. **Carriers: FEEDING LIVE STOCK: LIABILITY.** "Where the carrier fed and watered the stock, the owner being present, and it appears that some of the stock was injured by reason of poison being contained in the hay fed to them, the hay being furnished by the carrier, *held*, that in such cases the carrier is not an insurer of the stock against loss by reason of the poisoned hay, but would be liable only for
2. ———: ———: **CARE REQUIRED.** "Where the carrier undertakes to feed and water stock notwithstanding a contract imposing this duty negligence." *Starr v. Chicago, B. & Q. R. Co.*, 103 Neb. 645

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on the shipper, it is bound to exercise due care to see that the stock are given suitable food and water." 10 C. J. 96, sec. 108.

3. **Evidence** examined, and *held* sufficient to sustain the verdict.

APPEAL from the district court for Keith county:
J. LEONARD TEWELL, JUDGE. *Affirmed.*

C. A. Magaw, Thomas F. Hamer, and Douglas F. Smith,
for appellant.

George N. Gibbs and William E. Shuman, contra.

Heard before MORRISSEY, C. J., DEAN, ALDRICH and
DAY, JJ., COLBY and REDICK, District Judges.

ALDRICH, J.

This is an action at law to recover damages for the loss of certain horses and injury to others, which plaintiff alleged was caused by negligence of defendant in feeding the animals certain timothy hay at McComb, Mississippi. The shipment originated at Paxton, Nebraska, a town on the line of the Union Pacific Railroad Company, destined for Amite, Louisiana, and consisted of two carloads of horses. The Union Pacific Railroad Company and the director general of railroads were named as defendants, the shipment moving over the Union Pacific Railroad and the lines of connecting carriers. Defendant by his answer admitted the shipment, but alleged that by the shipping contract it was the duty of the shippers, at their own risk and expense, to load, unload, care for, feed and water the horses while in transit. Defendant further alleged that the injury damage resulted from negligence of plaintiff, and not from negligence of defendant. Issues were joined by plaintiff's reply, which alleged that defendant assumed to feed the horses and to provide feed and forage at McComb, Mississippi, and that defendant required plaintiff to pay for the feed. The lower court sustained the motion of the Union Pacific Railroad Company to be dismissed from the action. The trial resulted in a verdict and judgment for plaintiff in the sum of \$2,677.44. Motion for new trial was overruled, and defendant appeals.

In this case among the most important issues is: "Did the carrier know that the hay fed contained poison; or in the exercise of ordinary care should it have known?" This is the principal issue in the case, and "the burden is on the owner to show that the loss complained of was occasioned by the carrier's negligence." With these two issues clearly defined we should have no trouble in disposing of the merits of this case and arriving at a correct conclusion. We should remember that: "When the owner, or his agent, accompanies the shipment of stock, the duty of feeding and watering the stock when placed in the carrier's yards is primarily upon the owner. If he fails to do so, then the duty is upon the carrier. The duty is also upon the carrier to furnish the proper facilities for the feeding and watering of the stock." *Starr v. Chicago, B. & Q. R. Co.*, 103 Neb. 645.

This then adds another law question among those already quoted as to the issues to be determined in this case.

It is obvious from the record that plaintiff was the owner of the horses in question; that defendant, notwithstanding the ownership or any of the provisions of the shipping contract, undertook, as the facts appear, to feed the horses shipped for plaintiff. Then it follows and must be assumed that it guaranteed to feed these horses suitable food only and to take such other care of them as would be conducive to their good health. If in the course of the evidence it appears that defendant in feeding these horses was guilty of handing to them mouldy, dusty and smutty hay, then it would be liable for the consequences, and if it failed to exercise proper caution in feeding these horses then it would be guilty of negligence. It must be conceded by the record that defendant knew from its mouldy condition that the hay contained a certain poisonous substance. Then it would be liable under these circumstances and undisputed facts for whatever damage resulted by reason of feeding the same.

The case of *Starr v. Chicago, B. & Q. R. Co. supra*,

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would be in point and the law therein announced governs this transaction. The law of this case governs the propositions that control this matter and is as follows: "Where the carrier fed and watered the stock, the owner being present, and it appears that some of the stock was injured by reason of poison being contained in the hay fed to them, the hay being furnished by the carrier, *held*, that in such case the carrier is not an insurer of the stock against loss by reason of the poisoned hay, but would be liable only for negligence."

It is admitted as a matter of record that some poisonous substance was the proximate and immediate cause of the deaths of those horses which died and the damage to others. This being true, then there is but little, if any, use of discussing any other issues of the case because they become obvious.

We might by way of quoting further say: "Where the carrier undertakes to feed and water stock notwithstanding a contract imposing this duty on the shipper, it is bound to exercise due care to see that the stock are given suitable food and water." 10 C. J. 96, sec. 108.

We adopt this as the rule of law as governing here in this case.

Also in the case of *Louisville & N. R. Co. v. Tharpe*, 11 Ga. App. 465, we find the following language: "The evidence was conflicting. It may be that, under the terms of the contract requiring the shipper or owner to accompany the stock and feed and water them, the railroad was not bound to feed the stock. See, in this connection, *Weaver v. Southern R. Co.*, 11 Ga. App. 355. When the carrier undertook to feed and water the stock, it was, of course, bound to give them proper food, and exercise at least ordinary care and diligence in feeding and watering them. While there was direct evidence in behalf of the carrier that the food given the stock at Montgomery was not defective in any respect, there was evidence from which the jury were justified in finding that the stock were improperly fed at Montgomery, and that this improper

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feeding was the cause of the death of eight of the mules. This being so, it can not be said that the jury were not authorized to find that the defendant had failed to overcome the presumption of its negligence arising from proof of the damage."

There is ample and sufficient competent evidence to sustain the verdict of the jury. Plaintiff in his testimony detailed what kind of hay was fed to the horses. The bales looked all right on the outside, but when opened showed a dusty and mouldy condition. He objected to the hay; but was told that it was "none of his business." At that time three bales had been given to the horses. The remainder, four bales, was fed while plaintiff was eating breakfast, disregarding his order to give them no more of that hay. Plaintiff also testified that the horses were in good shape when they arrived at McComb, that several of them died at Amite, and that they were all more or less sick. The veterinarian, who made a *post-mortem* examination of the dead animals at the instance of the railroad company, testified that they died from forage or food-poisoning. Every one showed symptoms of enteritis or intestinal trouble. On the main issue of whether or not the carrier was negligent in feeding spoiled hay, there was a substantial conflict in the evidence, and for the reasons given we will not disturb the jury's finding.

The law in this class of cases is shown to be clear, well-defined and positive, and leaves no room to doubt or guess what is the duty of the court in deciding the issues presented. Therefore, with this brief discussion and enumeration of points, we say this case without doubt should be affirmed.

AFFIRMED.

JAMES G. V. INGOLDSBY V. STATE OF NEBRASKA.

FILED JUNE 27, 1923. No. 23095.

1. **Criminal Law:** VERDICT: REVIEW. "A judgment of conviction in a criminal case will not be set aside because of conflicting evidence,

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where the evidence of the state, if believed by the jury, is sufficient to sustain the verdict." *Denker v. State*, 106 Neb. 779.

2. **Evidence** examined, and found sufficient to sustain the verdict.

ERROR to the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Affirmed: Sentence reduced.*

Stough & Dunn, for plaintiff in error.

O. S. Spillman, Attorney General, and *Lloyd Dort*, *contra*.

Heard before MORRISSEY, C. J., ROSE and ALDRICH, JJ., COLBY and REDICK, District Judges.

ALDRICH, J.

Plaintiff in error, hereinafter called defendant, was charged with committing the crime of forgery on or about October 19, 1920, in Otoe county. The information in two counts charged, in substance: (1) **Forging the check in question**; (2) **uttering and publishing**. The first count having been dismissed by the county attorney, defendant was tried on the second count and was found guilty. The lower court sentenced him to confinement in the penitentiary for a term of not less than 10 nor more than 20 years, and ordered that he pay a fine of \$200 and costs. Defendant prosecutes error.

A number of errors are assigned. We have considered and examined all of them, but do not find it necessary to discuss each one, since there was no reversible error occurring at the trial in receiving evidence and giving instructions.

Considering the sufficiency of the evidence, we find that all the essential elements of the crime charged have been proved. For a complete discussion of the evidence required in this class of cases, see 26 C. J. 959, *et seq.* There was a conflict in the evidence generally, but the record taken as a whole demonstrates and proves defendant's guilt beyond a reasonable doubt. One handwriting expert and several bankers were called to identify the handwriting on the check, and their testimony is strong and convincing as to defendant's guilt.

The check in question is in words and figures as follows:

"Cherokee, Iowa, Oct. 16, 1920.

"Security National Bank 72-1821

"Pay to the order of J. G. V. Ingoldsby \$400.00

"Four-hundred and no/100 dollars.

"Thomas P. Benson."

Defendant presented this check at the Bank of Talmage, Talmage, Nebraska, and received for it \$200 in cash and \$200 in a bank draft. Upon presentation of the check to the Iowa bank, it was found that no such person as Thomas P. Benson had an account or did business there. Matters were held in abeyance for a time pending defendant's promises to pay and his alleged efforts to find and prosecute the maker of the check, who, the evidence tends to show, was fictitious without a doubt.

Defendant's evidence presents a contradictory and different story from that detailed by the witnesses for the state. The evidence is in direct conflict as to the existence or nonexistence of Thomas P. Benson. In this matter the jury were free to give credence and believe whichever set of witnesses they thought were telling the truth. In all fairness to the system of trial by jury, we cannot reverse their finding unless it is clearly wrong. The verdict is amply sustained by sufficient competent evidence and will not be disturbed.

The rule found in the case of *Denker v. State*, 106 Neb. 779, governs us in this matter. It is as follows: "A judgment of conviction in a criminal case will not be set aside because of conflicting evidence, where the evidence of the state, if believed by the jury, is sufficient to sustain the verdict." See *Wheeler v. State*, 79 Neb. 491.

The lower court erred in one respect. Defendant should have been sentenced under the provisions of section 9152, Rev. St. 1913, instead of section 10248, Comp. St. 1922. In other words, the indeterminate sentence law in force at the time the crime was committed governs the court in rendering judgment. In the instant case the sentence

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under the provisions of the latter section has the effect of shortening the period within which defendant would be eligible to make application for a parole. The court is without authority to do this. *Seaton v. State*, 109 Neb. 828.

It follows that the sentence should be changed to a minimum of 1 year and a maximum of 20 years, and it is so ordered.

In all other respects the case is affirmed.

AFFIRMED: SENTENCE REDUCED.

MARY YERKES V. STATE OF NEBRASKA.

FILED JUNE 27, 1923. No. 23132.

1. **Prostitution: DISORDERLY HOUSE: PROOF.** In a prosecution under section 9764, Comp. St. 1922, for the crime of causing a female person to become an inmate of a house of prostitution, evidence of the general reputation of a house is admissible to prove its character, and particular acts of lewdness or prostitution need not be proved.
2. **Evidence** examined, and found sufficient to sustain the verdict.

ERROR to the district court for Platte county: A. M. POST, JUDGE. *Affirmed.*

Garlow & Long and *Organ & Delitala*, for plaintiff in error.

O. S. Spillman, Attorney General, and *George W. Ayres*, contra.

Heard before MORRISSEY, C. J., LETTON and ALDRICH, JJ., BLACKLEDGE and COLBY, District Judges.

ALDRICH, J.

Defendant was convicted in the district court for Platte county for pandering in the city of Columbus, Nebraska, under section 9764, Comp. St. 1922, and was sentenced to confinement in the penitentiary for a term of not less than one nor more than three years. Defendant prosecutes error.

The first assignment of error is that the lower court erred in admitting testimony as to the general reputation of the house owned by defendant and described in

the indictment. Defendant contends that the reputation of the place is not in issue, and that the state must show that the house was actually a house of prostitution. Specifically the assignment of error is directed at the testimony of the state's witnesses, Lehman and Adams, with the claim that the same is hearsay. Lehman was a police officer in the city of Columbus and Adams was the proprietor of a hotel situated within a block of the house in question. Both witnesses testified as to its general reputation. This evidence was admissible under well-established rules of evidence.

"The weight of authority seems to be that evidence of reputation is admissible to prove the character of a house, and particular acts of lewdness or prostitution need not be proved." 4 Ency. of Evi. 725. See, also, *Drake v. State*, 14 Neb. 535; *State v. Bresland*, 59 Minn. 281; *Hogan v. State*, 76 Ga. 82; *Betts v. State*, 93 Ind. 375.

Defendant contends that there was error committed in admitting the testimony of the witness Lehman as to his finding intoxicating liquor upon the premises in question. We find that this matter was brought out incidentally in Lehman's testimony in answer to a general question as to what was said and done during one of his visits to the house. No objection was made to the question when asked, but defendant's motion to strike from the record a part of the answer as a statement of a conclusion was sustained by the trial judge. This was the only objection made to the evidence at the trial. Defendant is not in a position now to complain.

The next issue presented is: Did the court err in overruling defendant's motion to strike the testimony aduced on cross-examination of defendant with reference to litigation pending in federal court at Omaha in connection with a liquor charge? The record shows that this matter was first brought out on direct examination of defendant as follows: "Q. Was there anything along about the time you moved in again, or just before that

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was anything done by the state or federal officers in regard to locking the place up? A. Yes; they said they shut it up, but they never did." The questions asked were within the limits of proper cross-examination and, in view of the record made by defendant, are not prejudicial.

As to the sufficiency of the evidence, we find that defendant's assignment of error is not well taken. The evidence was in direct conflict as to the material facts. The testimony of the state's witness, Mabel Jones, was, in substance, that defendant gave her board and room with the understanding that she was to engage in prostitution and to give one-half the proceeds to defendant. Several witnesses who testified in behalf of defendant, and defendant herself, tell a story contradictory to this; but, it being a question purely of fact, the jury were at liberty to believe the witnesses they thought were telling the truth. In view of the record, we will not disturb their finding, which is sustained by sufficient competent evidence.

This being a question of fact, we cannot be called in to disturb the verdict of the jury, and could not do so as a matter of law. The case, then, is for affirmance.

AFFIRMED.

WILLIAM M. BRUCE, APPELLANT, v. ALVIN O. CADMAN
ET AL., APPELLEES.

FILED JUNE 27, 1923. No. 22395.

1. **Trusts: CONSTRUCTIVE TRUST: BURDEN OF PROOF.** The burden of proof is upon one claiming the title to real estate by virtue of a constructive trust, to establish the trust by clear and satisfactory evidence.
2. ———: ———: **SUFFICIENCY OF EVIDENCE.** Evidence examined, and held not sufficient to establish a constructive trust.

APPEAL from the district court for Phelps county:
WILLIAM A. DILWORTH, JUDGE. *Affirmed.*

Frank A. Anderson, for appellant.

Davis & Ellis and George W. Prather, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN and DAY, JJ., BUTTON, District Judge.

DAY, J.

This action was brought by William M. Bruce against Alvin O. Cadman, and his wife, Mrs. Alvin O. Cadman, praying for a decree quieting the title in plaintiff to certain real estate in the city of Holdrege, Nebraska, and also for an injunction restraining the defendants from disposing of said real estate. Upon the filing of the petition a restraining order was granted which, by stipulation of the parties, was continued in force until the trial of the case on its merits. Upon the trial the restraining order was dissolved and the plaintiff's action dismissed. Plaintiff appeals.

The plaintiff's action is founded upon the theory of a constructive trust. It is his claim that the real estate in question was purchased with his money, and the title thereto was taken in the name of Alvin O. Cadman.

The record shows that the plaintiff, for some time prior to the transaction which forms the basis of this action, had been engaged in the business of buying and selling grain. In his business he operated nine elevators. Defendant Alvin O. Cadman was employed by the plaintiff as bookkeeper, but he performed the duties of office clerk and general utility man. As a part of his duties he drew checks on the plaintiff's banking account by signing the same, "W. M. Bruce, A. O. C." During his term of employment, which extended from the latter part of 1917 to the spring of 1920, he drew hundreds of checks in this manner. Defendant testified that he had authority to draw checks for his personal affairs on the plaintiff's banking account without limitation. Plaintiff denies that defendant's authority was as broad as the defendant claims.

Be that as it may, the fact is that defendant did draw checks in payment of his personal affairs on the plaintiff's banking account. Such checks bore the notation,

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"Chg. A. O. C.," which meant that the same should be charged against the defendant's account on the books. The defendant kept no bank account, but transacted all his business by checks drawn on plaintiff's banking account. He would credit himself on the plaintiff's books with his salary. Other moneys received by him were deposited in plaintiff's name in the bank, and in turn credited to defendant on the plaintiff's books. In other words, the defendant treated the plaintiff as his banker, the status of his account with the plaintiff being disclosed by the plaintiff's books.

The record shows that during the period of his employment defendant drew 674 checks for his personal affairs, ranging in amounts from 43 cents to \$1,500. That the plaintiff knew that defendant was using the bank account in this manner, there seems to be no doubt. He had access to the books, frequently examined them, and posted some of these very checks.

It appears that defendant drew 434 of these checks prior to August 7, 1919, at which time he drew a check for \$1,500 in payment for the residence property which is the subject of dispute. This check bore the notation, "Chg. A. O. C.," and was charged against defendant's account on plaintiff's books. Some 15 months later, and when defendant had entered into a contract to sell the real estate, the plaintiff brought the present suit.

The evidence on behalf of the defendant tends to show that at the time he drew the \$1,500 check in payment of the real estate he had a credit on the plaintiff's books for a much larger sum than \$1,500. Defendant insists that in paying for the property he simply used his own money. The record shows that both the plaintiff and defendant at divers times speculated on the board of trade in grain transactions, and each had a separate account disclosing the status of these transactions. It appears that the plaintiff had a large credit with one of the large grain dealers. When plaintiff gave an order for the purchase or sale of grain in his own behalf, his

trade would be designated by the initial letter "A." When defendant made such a trade, his would be designated by the letter "C;" but in either instance the trading would be done in the name of the plaintiff. The credits and debits, as the case might be, were properly entered on the plaintiff's books. On August 9, 1919, when defendant drew the \$1,500 check, his personal account on the books showed a debit of \$2,616.28, and his option account a credit of \$5,021.69, showing a grand balance to the defendant's favor and credit of \$2,405.41. Later this balance was wiped out by losses, and at the time of the trial the books indicated that the defendant was owing plaintiff \$6,623.38.

It is the contention of the plaintiff that if several grain deals, which were still open on August 7, 1919, had been closed, the credit in defendant's favor would have been very small, and not sufficient to pay the \$1,500 check. He was unable to testify, however, what the outstanding trades were as his records had become misplaced. On this point the defendant testified that the trades were all closed at that time; that there was no way of determining from the books when the trades were made; that some of them were "open" and "shut" the same day; and that the only method of determining when the trades were made would be an examination of the confirmations.

The burden of proof was on the plaintiff to show the existence of the trust by clear and satisfactory evidence. This we think he did not do. The evidence shows that the plaintiff saw this \$1,500 check when it came in. He had previously gone with the defendant to examine the property purchased, and advised with him concerning it. That he knew that the plaintiff purchased the property, and that the check was given in payment therefor, seems to be clearly established. This suit, which in fact was to declare a trust, was not commenced for 15 months after the defendant purchased the property, and not until the defendant's credit on the books had been wiped

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out and he had become a debtor of the plaintiff in a large sum.

Considering the entire record, we are satisfied that the plaintiff has failed to show by clear and satisfactory evidence the existence of a trust.

The judgment of the trial court was right, and it is, therefore,

AFFIRMED.

RICHARD H. SCHMIDT V. STATE OF NEBRASKA.

FILED JUNE 27, 1923. No. 22742.

1. **Husband and Wife: ABANDONMENT: VENUE.** Where the matrimonial domicile has been established in one county, and the husband sends the wife to another county to reside until such time as he could find a new home and send for her; and where a child is born to the wife in the latter county; and where the husband fails to establish a new home or communicate in any way with her except to write a letter that he has gone forever; such facts are sufficient to authorize the wife to institute proceedings for wife and child abandonment in the latter county. Comp. St. 1922, sec. 9584.
2. **Bastardy: PRESUMPTION: REBUTTAL.** A child born at any time during wedlock is presumed to be legitimate, but this presumption may be rebutted by evidence that the husband was impotent, or that he did not have access.
3. **Witnesses: HUSBAND AND WIFE: ILLEGITIMACY OF CHILD.** In an action in which the legitimacy of a child born in lawful wedlock is an essential issue of fact, neither the declaration nor the testimony of husband or wife is competent on the question of access, nor should either testify to collateral facts from which an inference of access or nonaccess may be drawn; but this rule does not preclude them from testifying concerning illicit relations in actions of adultery, incest, divorce or like cases not necessarily involving the illegitimacy of children born in lawful wedlock.
4. **Evidence** examined, and *held* sufficient to sustain a judgment of conviction.

ERROR to the district court for Pierce county: WILLIAM V. ALLEN, JUDGE. *Affirmed.*

H. B. Muffly, for plaintiff in error.

Clarence A. Davis, Attorney General, *C. L. Dort* and *George W. Ayres*, *contra.*

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Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN, DAY and GOOD, JJ., BUTTON, District Judge.

DAY, J.

This is a criminal prosecution brought in Pierce county, Nebraska, under section 9584, Comp. St. 1922, against Richard H. Schmidt, hereinafter called defendant, for abandoning his wife and child and wilfully neglecting and refusing to maintain or provide for them. Defendant was convicted and adjudged to serve a term of six months in the county jail. He has brought the record of his conviction to this court for review.

The facts will sufficiently appear in the course of the opinion.

It is first urged that the court erred in failing to sustain the defendant's motion to instruct the jury to return a verdict of not guilty, because the evidence showed that the venue was laid in the wrong county. Upon this phase of the case it is the contention of the defendant that the marital domicile of the defendant and his wife was at all times in Madison county, and that, therefore, if an offense was committed at all, which he denies, it occurred in Madison county and not in Pierce county.

It is now the settled law in this state that the county in which the matrimonial home or domicile of the husband and wife is located fixes the venue of a case prosecuted under section 9584, Comp. St. 1922, and that such a case cannot be instituted in another county. It has also been held that the husband has the right to establish the matrimonial domicile, and that it is the duty of the wife to recognize that fact. *Preston v. State*, 106 Neb. 848. The location of the matrimonial domicile depends in every case upon its own peculiar facts.

The defendant's motion for an instructed verdict in his favor was made at the close of the state's case. At that stage of the proceeding, the record showed that the defendant and his wife were married on September 10, 1919, in Madison county, in this state; that the defendant

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and his wife lived at Newman Grove, in said county, at the home of defendant's parents until November 10, 1919; that at that time the defendant sent his wife to the home of her parents in Pierce county; that he purchased a ticket for her, and stated that he would go out and find a place for them to live, and would then come after her; that he stated he was going to Craig, which is in Burt county. He never called for her, or sent her any money, or communicated directly with her. On the contrary he wrote a letter to her father, dated at Omaha, Nebraska, November 18, 1919, as follows:

"I am sure you will be somewhat surprised when you read this letter, but I am in trouble and forced to leave at once. Now don't think I am leaving because I did not love Violet, because I did love her, and now I will ask you to give her a home, and see that she is cared for. She is a good girl and I hate to leave her, but I am forced into it, and I am gone forever. My own folks don't even know I am gone. Now break the news easy to dear Violet or she is liable to do herself wrong. This letter will give her a divorce with my consent. Now there is three fellows in Norfolk watching to see you give Violet a home somewhere. Dick. I forgot to leave Violet's watch, so I will send it later on. The watch is broke so will leave it here in Omaha to get fixed and will have them send it to her. Am leaving for Great Lakes to-night. Don't know where I will go from there."

The record shows that on March 1, 1920, a child was born to the wife at Plainview, in Pierce county, where the wife and child have continued to reside with her parents. A complaint was filed against the defendant in July, 1920, in Pierce county, charging him with the offense upon which he was prosecuted. He was apprehended January 25, 1923, at Newman Grove, in Madison county.

Considering the wife's testimony in connection with the defendant's letter, it seems perfectly clear that it was defendant's intention to have his wife live in Pierce

county with her father until defendant established a new home. Under the condition of the record at the time the motion for a directed verdict was made, we are of the view that the court was right in refusing to direct a verdict in favor of the defendant.

While testifying in his own behalf, defendant stated that his home was in Madison county; that his wife had left him there; that she then told him she was going to leave, and she did not want him to bother her any more and she would not bother him. While this testimony appears to be inconsistent with the letter written by defendant, it was perhaps sufficient to raise a question of fact upon the issue of venue, and in all probability if the defendant had requested an instruction upon that issue, it would have been given. This he did not do. His only request was, as before stated, that the court direct a verdict in his favor because the evidence showed that the domicile of the parties was in Madison county. Defendant made no explanation of the circumstances which prompted him to write the letter, nor did he state whether in fact he went away as he stated in the letter he intended to do.

It is next urged that the court erred in excluding certain testimony offered in support of the defendant's theory that he was not the father of the child. While the defendant was a witness in his own behalf, he was asked, among other things, to detail a conversation had between himself and his wife on the evening prior to the wife's departure for Plainview, relating to the paternity of her unborn child. Objection was made to this line of testimony upon the ground that it called for a communication between husband and wife, and was not permissible under the statutes, and that it was incompetent. This objection was sustained. The defendant's counsel then offered to show by the witness that his wife had told him that she had deceived him; that he was not responsible for her pregnancy, but that another man was the father of her unborn child. Another witness was then

called by the defendant who testified that he had overheard the conversation between the defendant and his wife at the time in question, and he was asked to relate what he had heard. Objection was made to this line of testimony on the ground of incompetency, which was sustained by the court. Thereupon an offer was made to prove by the witness that he heard the wife state to her husband that her pregnancy was not caused by him.

The exchange of remarks between the court and counsel clearly indicates that the trial court's ruling was based upon the theory that the wife could not give testimony bastardizing her child born in lawful wedlock. The question is thus fairly presented whether a child born in wedlock can be proved to be a bastard by the testimony or declaration of the wife. In the early history of jurisprudence the rule upon this question swayed back and forth. It will serve no useful purpose to enter upon a discussion of the ancient rules, and the reasons given therefor. They can readily be found in any of the standard text-books on evidence. We think the rule settled by the weight of decisions in this country is that a child born in wedlock is presumed to be the legitimate offspring of the husband and wife, and this is so even though the birth of the child happen so soon after the marriage as to render it certain that it was the result of coition prior thereto. This rule is based in the main upon the reason that to permit such testimony would be against public policy. The following cases support this rule: *Dennison v. Page*, 29 Pa. St. 420, 72 Am. Dec. 644, and note, p. 649; *Wilson v. Babb*, 18 S. Car. 59; *Zachmann v. Zachmann*, 201 Ill. 380; *Tioga County v. South Creek Township*, 75 Pa. St. 433.

This presumption of legitimacy may be rebutted by competent proof that the husband had no access to the wife, or that he was absent at such time as in the course of nature the child was begotten; that he was impotent, or other circumstances showing that he could not have

been the father of the child. In *State v. Lavin*, 80 Ia. 555, it is said:

"When a child is born to a married woman, the law presumes it to be legitimate, and, unless born under such circumstances as to show that the husband could not have begotten it, this presumption is conclusive. But the presumption may be rebutted by facts and circumstances which show that the husband could not have been the father, as that he was impotent, or could not have access."

This rule finds support in *Wright v. Hicks*, 12 Ga. 155, and *Powell v. State*, 84 Ohio St. 165.

No attempt in conformity to the rules of evidence was made by the defendant to show any circumstances that rendered impossible for him to have been the father of the child.

The question is then presented, may the husband or wife testify concerning the illegitimacy of a child born in lawful wedlock? In 1 Jones, Commentaries on Evidence, sec. 97, the question is discussed, and numerous authorities cited. The author says:

"It is well settled on grounds of public policy, affecting the children born during the marriage, as well as the parties themselves, that the presumption of legitimacy as to children born in lawful wedlock cannot be rebutted by the testimony of the husband or the wife to the effect that sexual intercourse has or has not taken place between them; nor are the declarations of such husband or wife competent as bearing on the question. The rule not only excludes direct testimony concerning such intercourse, but all testimony of such husband or wife which has a tendency to prove or disprove legitimacy; for example, it was held incompetent to ask the husband, for the purpose of proving nonaccess, whether at a given time he did not live a hundred miles away from his wife, and whether at that time he was not cohabiting with another person. And the mother of a child born in wedlock, though begotten before, is incompetent to prove

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that the child was not begotten by the man who became her husband before its birth. * * * The rule rests not only on the ground that it tends to prevent family dissension, but on broad grounds of public policy. * * * Nor does it depend upon the form of action or the parties; on the contrary, it obtains whatever the form of legal proceedings, or whoever may be the parties."

It is quite clear that, if the wife would not be permitted to testify to facts which would bastardize her child, her declarations could not be used in evidence to prove the same fact.

In view of the entire record, and the manner in which the defendant sought to establish that he was not the father of the child, we are of the opinion that the rulings of the trial court were clearly right.

While it seldom occurs that two cases are exactly alike, the general principles here involved find support in the following cases: *Wallace v. Wallace*, 137 Ia. 37; *People v. Overseers of the Poor*, 15 Barb. (N. Y.) 289; *Mink v. State*, 60 Wis. 583; *Egbert v. Greenwalt*, 44 Mich. 245; *Evans v. State*, 165 Ind. 369, 2 L. R. A. n. s. 619, and note; note under *Powell v. State* (84 Ohio St. 165), 36 L. R. A. n. s. 255.

It is next urged that the court erred in giving instruction No. 4, which reads as follows: "If the prosecuting witness, Violet Schmidt, and the defendant, Richard H. Schmidt, were lawfully married and thereafter a child was born to them in lawful wedlock, the law conclusively presumes its legitimacy and that it was the defendant's child." In this instruction we think there was a technical error in the use of the word "conclusively." As before pointed out, the presumption of legitimacy may be rebutted by proper testimony. In view of the record, however, that there was no proper testimony tending to overcome the legal presumption of legitimacy, the use of the word "conclusively" in the instruction was not prejudicial.

Complaint is also made of certain remarks of the trial

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judge made during the progress of the trial, which, it is claimed, were prejudicial. It appears that quite a colloquy occurred between defendant's counsel and the court as to the admissibility of certain lines of testimony. Counsel was insistent in his efforts, and the court, in answering counsel, remarked: "If a man marries a woman voluntarily, he takes her for better or worse." Whereupon counsel stated "The evidence will show he did not marry her voluntarily." The court then remarked: "It doesn't make any difference, it is his business to support her regardless of who she is or where she was." In view of the testimony sought to be elicited, which gave rise to the argument between counsel and the court, the ruling of the court was entirely correct.

As we view it, the remarks of the court were without prejudice. No objection was made to the remarks at the time, and no request was made that the jury be instructed to disregard the statements made by counsel and the court.

Other assignments of error are made, which we have examined, and we find them to be without substantial merit.

No prejudicial error appearing in the record, the judgment of the trial court is

AFFIRMED.

GUST W. JOHNSON, APPELLANT, v. S. M. ERICKSON ET AL., APPELLEES.

FILED JUNE 27, 1923. NO. 22317.

1. **Executors and Administrators: SALE OF REALTY: PURCHASE BY EXECUTOR.** An executor's sale of real estate, made pursuant to a power conferred by the will of the decedent, at which the executor is, either directly or indirectly, the purchaser, is voidable.
2. ———: ———: ———. Where, at an executor's sale pursuant to a power contained in the will, the executor is, either directly or indirectly, the purchaser, it is immaterial that he paid full value for the land, and that no actual fraud was intended. The law forbids such a sale, and it may be avoided in a suit by the interested parties.
3. **Appeal: TRIAL DE NOVO.** While the law requires this court, in

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determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying.

APPEAL from the district court for Kearney county:
WILLIAM A. DILWORTH, JUDGE. *Affirmed.*

C. P. Anderbery, for appellant.

F. L. Carrico and *L. W. Hague*, *contra*.

Heard before MORRISSEY, C. J., ALDRICH and GOOD, JJ., BEGLEY, District Judge.

GOOD, J.

This action was brought to cancel an executor's deed, made pursuant to a power of sale in the will of John F. Johnson, deceased, on the ground that the sale was made indirectly to one of the two joint executors. The testator left surviving him his widow and two sons, both of whom are of full age. The widow died intestate prior to the beginning of this action. S. M. Erickson and Will A. Johnson were nominated as executors and duly qualified as such. By the fifth paragraph of his will, testator directed his executors to sell a particularly described 80-acre tract of land, and directed the disposition of the proceeds of the sale.

Pursuant to the power of sale conferred by the will, the executors, on June 9, 1917, for a consideration of \$6,000, sold and conveyed the land to Ferdinand Hulquist, a nephew of Erickson, one of the executors, and at the same time the widow and sons of testator joined in a quitclaim deed to Hulquist. Proceeds of sale were disposed of as directed in the will. Administration proceedings were completed and the executors discharged from their trust on August 24, 1917. On September 29, 1917, Hulquist, for a consideration of \$6,000, conveyed the land in question to the said S. M. Erickson. This action is prosecuted by the sons of the testator to cancel

the quitclaim deed and executor's deed to Hulquist, and also the deed from Hulquist to Erickson. Plaintiffs offer to reimburse Erickson for the purchase price paid by him, together with interest thereon, and pray for an accounting of the rents and profits during the time that Hulquist and Erickson have been in possession of the land.

The district court found for the defendants, and that the executor's sale was made in good faith to Hulquist, and that he was not acting for Erickson in purchasing the land. Plaintiffs have appealed.

1. Defendants urge that the sale to Hulquist by the executors was not a judicial sale, because it was made pursuant to a power conferred by the will, and that it is, therefore, not governed by the provisions of section 1408, Comp. St. 1922, which declares that an executor's sale of a decedent's real estate shall be void if the executor is the purchaser, or is interested in the purchase, of the land. It may be conceded that said section refers only to judicial sales made pursuant to an order of the district court, but plaintiffs' right to maintain the action is not dependent upon this statute. Under the rule at common law, an executor could not purchase, either directly or indirectly, at a sale of his decedent's lands under a power in the will. *O'Dell v. Rogers*, 44 Wis. 136. The reason for the rule would be the same in either case. It is but a general application of the rule against the purchase by the trustee of property belonging to the trust estate. It is founded upon the unfairness that is likely to follow upon a sale in which the same person is both vendor and purchaser.

2. Defendants further urge that the sale is not subject to attack, because the land was sold for its full value and no one was defrauded. The rule, however, is that actual fraud is not necessary to invalidate such a sale. "And it matters not if he pays all the property is worth, nor if the sale is advantageous to the *cestui que trust*. It is a matter, of course, for courts of equity to

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set the sale aside upon the application of the *cestui que trust*. The object of the rule is to afford the *cestui que trust* most ample protection against fraud and injustice, and to remove out of the way of the trustee all inducements and temptations to speculate upon the trust property, or to manage and manipulate the same for his own benefit." *Terwilliger v. Brown*, 44 N. Y. 237. And in *Miller v. Rich*, 204 Ill. 444, it is said: "It makes no difference, in such case, that the intentions of the administrator are honest, and that there is no fraud in fact. The sale will be set aside upon the general ground that trustees, and others occupying fiduciary relations, cannot purchase on their own account the property entrusted to their management." A full collection of the authorities upon this question may be found in the note to *Haymond v. Hyer*, L. R. A. 1918B, 1.

The record shows that \$6,000 was the full market value of the land at the time it was sold to Hulquist by the executors. This fact would not make the sale valid, if there were any understanding, secret or otherwise, that Hulquist should subsequently convey the land to one of the executors, but it may properly be considered as a factor in determining the *bona fides* of the sale to Hulquist. There would be less incentive on the part of Erickson to acquire title by subterfuge, if he were paying full value for the land, than there would be if he were getting the land for less than its actual value. Another fact, which should not be overlooked, is that plaintiffs had knowledge of the conveyance to Hulquist for nearly three years before they instituted this action, and during that time the value of the land had greatly increased, in common with the rise in land values generally in Nebraska during the period from 1917 to 1920. Both the executors and their vendee, Hulquist, testified that there was no arrangement or understanding, secret or otherwise, when the sale was made to Hulquist, that he was purchasing it for Erickson, or that it should be

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subsequently conveyed to Erickson for the same consideration or any other sum. There is no direct evidence to the contrary, but there is evidence in the record of a number of circumstances that, unexplained, would tend very strongly to indicate that it was an indirect sale to Erickson. Some of these circumstances are fully and fairly explained, and, as to some of the others, there is a sharp conflict in the evidence.

3. While the law requires this court to hear and determine, as a trial *de novo*, an appeal in an equity action involving questions of fact, and to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying. *Greusel v. Payne*, 107 Neb. 84; *Shafer v. Beatrice State Bank*, 99 Neb. 317.

After a careful examination of all the evidence, we are of the opinion that the judgment and decree of the district court is supported by the evidence and is in accord with equity and justice. The view we take of the question of fact makes it unnecessary to consider other issues that have been presented and argued in the briefs.

AFFIRMED.

IDA LEVIN, ADMINISTRATRIX, APPELLANT, V. LOUIS MUSER,
ADMINISTRATOR: RICHARDSON DRUG COMPANY, APPELLEE.

FILED JUNE 27, 1923. No. 22447.

1. **Poisons: SALES: LABELS.** The statute of this state, regulating the sale of articles usually known as poisons, requires, if they are articles of medicine, that the word "poison" be marked on the label or wrapper of each package. There is no such statutory requirement as to the sale of poisons other than articles of medicine, and the sale thereof without being labeled as poisons violates no statutory requirement and does not constitute a wanton wrong.
2. ———: ———: **LIABILITY.** A wholesale drug company sold and delivered to a retail druggist a bottle of poisonous oil, which was

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not an article of medicine, with a label bearing the correct name of the oil, but not marked "poison." The retailer sold and delivered it, bearing the same label, to a customer, who took it home, and later, mistaking it for a throat medicine he had been using, swallowed some of the oil, which caused his death. In an action by his administratrix against the wholesale drug company to recover damages for causing wrongful death, *held*, that the sale of the poisonous oil by the wholesale drug company was not the proximate cause of the injury.

APPEAL from the district court for Douglas county:
L. B. DAY, JUDGE. *Affirmed*.

Wymer Dressler and Robert D. Neely, for appellant.

Edwin M. Martin and Alfred C. Munger, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN and GOOD, JJ., BLACKLEDGE, District Judge.

GOOD, J.

Ida Levin, as administratrix of the estate of Louis Levin, deceased, brought this action against Richardson Drug Company, a corporation, engaged in the wholesale drug business, and Carl T. Schmidt, operating a retail drug store, to recover damages for the wrongful death of plaintiff's decedent. Since the commencement of this action defendant Schmidt has died, and the action has been revived in the name of Louis Muser, as administrator of his estate. A general demurrer to the petition was interposed by Richardson Drug Company, which was sustained and the action as to it dismissed. Plaintiff has appealed, and the only question presented for our consideration is the correctness of the ruling on the demurrer.

Plaintiff alleges in her petition that the defendant Richardson Drug Company owned and had in its possession one certain bottle containing oil of mirbane, a deadly poison, and that ordinary care and prudence required said drug company, as a dealer in said poisonous and deadly agency, to label the same as a poison, so that persons handling or using said oil of mirbane would not

inadvertently take the same internally and be injured or killed thereby; but that said drug company, disregarding its duties in the premises, sold and delivered the same to the defendant Schmidt, who in turn sold and delivered it to Louis Levin without any label thereon, except the words "oil of mirbane;" that Levin took the bottle home and on the same day, believing it to be a bottle of throat gargle, which he had been using, took some of the contents in his mouth and was thereby burned and choked, causing him to swallow some of the oil, which resulted in his death. Plaintiff alleges that each of the defendants was negligent in failing to label the bottle as a poison and that such negligence proximately caused the death of Levin.

1. Was the drug company negligent in selling the poisonous oil to a retail druggist without labeling it as poison? If such sale was negligence, was it the proximate cause of Levin's death? The statute of this state, regulating the sale of articles usually known as poisons, requires, if they are articles of medicine, that the word "poison" be marked on the label or wrapper of each package. There is no such statutory requirement as to the sale of poisons other than articles of medicine. There is no allegation in the petition that oil of mirbane is an article of medicine, or that it is ever used for medicinal purposes. Its sale without being labeled a poison violated no statutory requirement. That the drug company was not guilty of a wanton wrong is beyond question.

2. This court, in *Spratlen v. Ish*, 100 Neb. 844, has held: "The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred." Whether an alleged act of negligence is the proximate cause of an injury is ordinarily a question of fact, but, to warrant a finding that the negligent act, not amounting to a wanton wrong, is the proximate cause of

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an injury, it must appear that the injury was a natural or probable consequence thereof, and that, in the light of attending circumstances, it should have been foreseen or anticipated. *Bryant v. Beebe & Runyan Furniture Co.*, 78 Neb. 155; *Milwaukee & St. Paul R. Co. v. Kellogg*, 94 U. S. 469.

Tested by these principles, the drug company is not liable in damages for causing the death of Levin, unless, from the facts pleaded, the inference may be reasonably drawn that his death was the natural or probable consequence of the sale of the oil without being labeled as a poison, and that under the circumstances it should have been reasonably anticipated that death, or at least serious injury, to some person would occur. We think, under the facts pleaded, that neither the death of Levin nor a serious injury to any person could be reasonably apprehended or anticipated by the sale of a poisonous substance, labeled by its proper name, to one having full knowledge of its dangerous character. If Levin was ignorant of the dangerous character of the oil purchased by him and his vendor, Schmidt, knew or had reasonable grounds for believing him ignorant of its character, then the act of Schmidt would be a new and efficient intervening cause that produced the injury, and without which it would not have occurred. We do not wish to be understood as holding that defendant Schmidt is in fact liable, or that a cause of action is stated as against him. *McKibbin v. Bax & Co.*, 79 Neb. 577, was an action to recover damages for the unlawful sale of a poison by a druggist to a minor, who in turn administered it to a third person, who was injured. It appears in that case that the minor, who purchased the drug, was 18 years of age and had knowledge of its dangerous character. A recovery in that case was denied on the ground that the sale by the druggist was not the proximate cause of the injury complained of. In this case, as above pointed out, the sale by the drug company was not an unlawful act and was

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made to one having full knowledge of its dangerous character. Other cases and authorities, supporting the views herein expressed, are: *Gibson v. Torbert*, 115 Ia. 163; *Meyer v. King*, 72 Miss. 1; *McCrossin v. Noyes Bros. & Cutler*, 143 Minn. 181; 9 R. C. L. 705, sec. 13; 19 C. J. 780, sec. 46.

The allegations of the petition do not warrant an inference that the sale of the oil of mirbane by the drug company was the proximate cause of the death of Levin. The demurrer was properly sustained.

AFFIRMED.

DANA L. DIMOND V. STATE OF NEBRASKA.

FILED JUNE 27, 1923. No. 23279.

Divorce: SUPPORT OF CHILDREN. While the decree rendered in a divorce action in this state, awarding the custody of the minor children to the mother and providing an allowance for their support and maintenance, remains in force, the father is not required to provide food, clothing and shelter for such minor children, the measure of his liability in that respect being the amount provided in the decree.

ERROR to the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Reversed and dismissed.*

John W. Cooper and E. R. Leigh, for plaintiff in error.

O. S. Spillman, Attorney General, and *Lee Basye*,
contra.

Heard before MORRISSEY, C. J., LETTON, DEAN and
GOOD, JJ., BLACKLEDGE, District Judge.

GOOD, J.

Plaintiff in error, hereinafter called defendant, was prosecuted in the district court on a complaint made by his former wife charging that he had, without good cause, refused and neglected to provide proper food, clothing and shelter for his minor children, D. L. Dimond, aged 18 years, and Carle E. Dimond, aged 20 years. On a trial he was convicted and sentenced to

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imprisonment for 90 days in the county jail. He has brought the case here by error proceedings to review the record of his conviction.

Defendant and complainant were divorced in Douglas county in May, 1906. By the decree in that action the wife was awarded the custody of these children, then aged two and four years, and a monthly allowance for their support and maintenance. This decree has never been reversed or modified and remains in full force. Complainant has ever since had the custody of the children and has received their earnings.

Section 1526, Comp. St. 1922, provides that the district court, upon granting a divorce, "may make such further decree as it shall deem just and proper concerning the care, custody and maintenance of the minor children of the parties, and may determine with which of the parents the children or any of them shall remain." The next section of the statute provides: "If the circumstances of the parents shall change, or it shall be to the best interests of the children, the court may afterwards, from time to time, on its own motion, or on the petition of either parent, revise or alter, to any extent, the decree so far as it concerns the care, custody and maintenance of the children or any of them." Comp. St. 1922, sec. 1527.

These statutory provisions afford full opportunity to determine what amount the father is able to and should contribute to the support and maintenance of his minor children when their custody has been awarded to the mother in a divorce action. If the allowance is insufficient the court may, upon a proper showing, increase the amount. When, in a divorce action, there has been such a judicial ascertainment of the amount the father should pay for the support of his minor children, that amount is presumed to be just and reasonable until it is reversed or modified by a subsequent order of the court. The amount thus ascertained, so long as the decree remains in full force, is, in this state, the legal

measure of the father's liability for the support of such children. If the father fails, without good cause, to comply with the decree respecting the payment of alimony and the support of the minor children, he may be prosecuted under section 9588, Comp. St. 1922, which makes it a misdemeanor for a husband, against whom a decree of divorce and alimony for the support of his children has been rendered by any court of competent jurisdiction in this state, to refuse or neglect, without good cause, to pay the amounts and in the manner provided by the decree. However, defendant is not charged with a violation of this section, but of section 9587, Comp. St. 1922, which provides generally that if a father wilfully fails or neglects to provide proper food, clothing and shelter for his minor children, he may be punished as for a misdemeanor. While the decree in the divorce action, awarding the custody of the minor children to the mother and providing an allowance for their support and maintenance, remains in force, the father is not required to provide food, clothing and shelter for his minor children, the measure of his liability in that respect being the amount provided in the decree.

The record shows that the two boys, whom defendant is charged with failing to support, are each six feet or more in height, physically strong and able-bodied, and capable of earning their own living. They are both graduates of the Omaha high school, have attended the State University, and one is now in Dartmouth College, in New Hampshire, and the other in the State University of California. For more than 30 years the defendant has been a dentist, but for a number of years he has suffered to some extent from partial paralysis, which affects his right hand, and particularly the thumb and index and middle fingers, to such an extent that he is unable to do certain kinds of dental work and can work for a limited number of hours only at such kind of dental work as he is able to do. His gross income for the past few years has averaged about \$125 a month, of

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which approximately \$50 a month is consumed in office rent and incidental expenses. The value of his property is insignificant. The evidence clearly shows that the two boys in question are better able to earn a living than is the defendant. While the efforts of the two young men to obtain a college education should not be decried, but rather commended, it does not follow that the partially disabled father, who is without means and able to earn but a meager living, is liable criminally for failure to furnish them a university education. We are impressed that the prosecution of this case was inspired by personal animus and malice on the part of the complainant, rather than a proper vindication of the law.

The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

WILLIAM D. ENSOR, ADMINISTRATOR, APPELLEE, v. A. D. COMPTON, APPELLANT.

FILED JUNE 27, 1923. No. 22355.

1. **Death: DAMAGES.** The amendment to section 1429; Rev. St. 1913, made by ch. 92, Laws 1919 (Comp. St. 1922, sec. 1383), providing that, in actions for death by wrongful act, "the verdict or judgment should be for the amount of damages which the persons in whose behalf the action is brought have sustained," does not permit recovery for other than financial loss, either present or which may reasonably be anticipated to result in the future.
2. ———: ———. Loss of companionship should not be submitted to the jury as an element of damage in such actions, except under special circumstances where it can reasonably be said that under the evidence it has a money value.
3. **Evidence** examined, and held sufficient to sustain the verdict of the jury.

APPEAL from the district court for Douglas county:
CARROLL O. STAUFFER, JUDGE. *Affirmed.*

Stout, Rose, Wells & Martin, for appellant.

John O. Yeiser and E. A. Conaway, contra.

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Heard before MORRISSEY, C. J., LETTON, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

BEGLEY, District Judge.

On May 20, 1920, a collision occurred at the intersection of Fifty-second and Dodge streets, Omaha, Nebraska, between an Overland automobile driven from the north by Harry Montgomery, and a Buick automobile, driven from the east by A. D. Compton. Mrs. Inez Ensor, who was riding as a guest in the Montgomery car, was thrown from the car and seriously injured, from the effects of which she died within an hour. This action is brought by William D. Ensor, her husband, as administrator of her estate, who alleged that her death was caused by the negligent act of defendant in driving his automobile at a speed of about 50 miles an hour and without having his car under control. Defendant filed a general denial. Trial was had and verdict returned for plaintiff for the sum of \$5,000, and from a judgment thereon defendant has appealed.

It is first alleged that the court erred in giving instruction No. 16, as follows: "The jury are instructed that, if they find for the plaintiff, then in assessing damages they should not allow plaintiff anything for pain and sorrow or anguish of mind, but may allow full compensation for loss of services and companionship sustained by her husband in so far as they have a monetary value. You may take into consideration her age and health and the probable life expectancy in estimating such damages, if any you may so determine, in a sum not greater than the amount prayed for in the petition." This instruction was given at plaintiff's request on the authority claimed in *Wood v. City of Omaha*, 87 Neb. 213. In that case it was held that a similar instruction was not prejudicially erroneous as applied to the evidence.

Appellant contends that there is no evidence in this case to support such an instruction, and that under our statutes damages recoverable are restricted to pecuniary

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injuries resulting from such death, citing a long line of decisions, and also citing section 1429, Rev. St. 1913, which provides: "The jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death." However, section 1429 was amended in 1919 (Laws 1919, ch. 92), and now appears as section 1383, Comp. St. 1922, in which the above language has been omitted and instead this provision appears: "The verdict or judgment should be for the amount of damages which the persons in whose behalf the action is brought have sustained." This amendment was made by the legislature after this court had, by a long line of decisions, held that damages in this class of cases were limited under the statute to money loss or its equivalent. This change, while significant, does not provide a wide open door to all sorts of claims for damages. The loss under the statute is still a pecuniary loss. Nothing can be allowed on account of mental suffering or bereavement or as a solace on account of such death. Only such damages can be recovered as are shown by the evidence to have a monetary value. In states having a statute similar to our own, it has generally been construed as permitting recovery of damages for loss of service and companionship under special circumstances where the evidence shows they have a money value. *Evans v. Oregon Short Line R. Co.*, 37 Utah, 431; *McFarland v. Oregon E. R. Co.*, 70 Or. 27; *Mize v. Rocky Mountain Bell Telephone Co.*, 38 Mont. 521; *St. Louis & S. F. R. Co. v. Moore*, 101 Miss. 768; *Bond v. United Railroads*, 159 Cal. 270. However, recovery for loss of services and companionship by a surviving husband or wife can only be sustained where the evidence shows a reasonable probability that such services and companionship afforded the survivor was of such a character that it would be of advantage to such survivor, and that a disallowance thereof would cause a pecuniary loss to him or her. *Sanfilippo v. Lesser*, 59 Cal. App. 86.

We think the instruction was not prejudicially erroneous under the evidence in this case. The evidence established that the deceased was 39 years of age; that she was married to the plaintiff herein in 1916; that she was employed in Council Bluffs at a salary of \$16 a week, and her husband was employed as a telegraph operator, working nights from 12 to 8 a. m.; that she cared for the house as a housewife; that she and her husband lived together in harmony, he being an ex-soldier and she assisting him in getting a start in life; that she contributed about one-half to the support of the home and purchased most of her wearing apparel. These facts might be taken into consideration by the jury for the purpose of estimating the amount of damages which the husband and next of kin have sustained. *Dickinson v. Southern Pacific Co.*, 172 Cal. 727.

Objection is made to the admission of certain evidence of witnesses who testified to the speed of a car going west about three blocks east of the place where the accident occurred. Two witnesses testified that immediately before the accident a car going at a rate of 40 to 50 miles an hour sped by them, going west, and that immediately thereafter they heard a crash, and upon coming to the intersection in question found the two cars had collided; and that no other car went by them at the time. Defendant testified that no other car passed at the time or immediately before or after the accident, and that he was driving at 18 to 20 miles an hour. The point of collision was west of the intersection; the witnesses disputed the distance as being between 24 to 50 feet west of the west curb line of Fifty-second street. After the collision appellant's automobile veered to the southwest, ran over the south curb, up a bank 3 or 4 feet high, and onto an adjoining lot about 52 feet from the apparent point of collision, before it could be stopped. We think this evidence constituted a sufficient circumstance, relating to the speed of defendant's car, to go to the jury, together with the other evidence in the case, as to

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whether defendant was negligent and whether such negligence was the cause of Mrs. Ensor's death. The question of negligence was clearly a question of fact for the jury, and their verdict, based upon conflicting evidence, should not be disturbed.

Evidence of witnesses at the Dodge street garage as to the speed of a car going west, which they judged was larger than a Buick, might well have been excluded, but we do not think its admission prejudicial error.

The circumstances surrounding the accident, the position of the cars thereafter, the marks of damage, the wreckage, and all the other evidence, presented a dispute to be settled by the jury as to who was first in the intersection of the street and had the right of way. The court's instruction on this branch of the case embodied the request of defendant.

The case is, therefore,

AFFIRMED.

**STATE BANK OF OMAHA, APPELLANT, v. MILTON C.
MURPHY ET AL., APPELLEES.**

FILED JUNE 27, 1923. No. 22403.

1. **Chattel Mortgages:** DESCRIPTION OF CHATTEL: QUESTION FOR JURY. Whether the description of a motor-truck set out in a chattel mortgage, together with other inquiries which the contract itself suggests, is sufficient to enable third persons to identify the property was, under the evidence in this case, a question of fact for the jury.
2. **Replevin:** DAMAGES. Where property replevied and delivered to plaintiff has a value on account of the use to which it may be put, other than its value for sale or consumption, the defendant, if successful, may recover the value of the use of the property during the time it was unlawfully withheld from him under the writ.
3. ———: ———: INTEREST. In an action of replevin, a plaintiff who wrongfully seized an automobile truck under the writ is liable for interest on its adjudicated value from the time of the seizure until he returns it or pays for it, where the net usable value is not shown by the evidence.

APPEAL from the district court for Lincoln county:

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HANSON M. GRIMES, JUDGE. *Reversed and remanded, with directions.*

James T. Keefe, for appellant.

Halligan, Beatty & Halligan, George N. Gibbs and Kennedy, Holland, De Lacy & McLaughlin, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and DEAN, JJ., BEGLEY, District Judge.

BEGLEY, District Judge.

Plaintiff brought this action in replevin to recover possession of a Model 11, 1½-ton Republic motor-truck, No. 6609, by virtue of a chattel mortgage which it claimed to have thereon, but which described it as "Model 11, 1½-ton Republic truck, No. 1609," instead of No. "6609." Defendants Murphy & Murphy claimed to be the owners by virtue of having purchased the truck from a retail dealer for full value, in good faith, and without notice of any claims thereon by other persons by virtue of a chattel mortgage or otherwise. The intervener claimed to be entitled to possession by virtue of a chattel mortgage executed by defendants, Murphy & Murphy, which correctly described the truck. The jury found its value to be \$1,500; that the right of property and right of possession at the commencement of the action were in defendants and intervener, and that Murphy & Murphy had sustained damages in the sum of \$1,200 by reason of being deprived of the use of the truck. From a judgment on the verdict, plaintiff has appealed.

Plaintiff's chattel mortgage was filed for record prior to the purchase of the truck by defendants and the execution of the chattel mortgage held by intervener. A question litigated in the lower court was whether the description in plaintiff's mortgage was sufficient, aided by inquiry which the mortgage itself suggested, to charge defendants and intervener with notice that plaintiff's mortgage covered Model 11, Republic truck No. 6609, instead of No. 1609. This question was submitted as a

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question of fact for the determination of the jury. Plaintiff contends this was error, in that the evidence was so conclusive that the court should have determined the question in its favor as a matter of law—citing *Crancer Co. v. Cooper*, 100 Neb. 335.

The evidence discloses that C. M. Trotter was a retail dealer in Republic trucks at North Platte, and, to secure part of the purchase price of a shipment of automobiles and trucks, he executed the mortgage held by plaintiff upon six automobiles and three Model 11, 1½-ton Republic trucks, serial numbers 1609, 1614, and 1622; and that at said time he had four Model 11, 1½-ton Republic trucks in stock. The correct serial numbers of the four trucks are not shown, except the three numbers set out in the mortgage. Trotter, having become deeply involved financially, absconded. It is a matter of common knowledge that trucks and automobiles are made in serial or factory numbers and the serial number is the usual method of identification. A truck is required to be registered and sold under this number, and a penalty is provided by law for altering or obliterating the number. Comp. St. 1922, secs. 8365, 8375, 9618-9621. Where the models are the same, the only means of identification is the serial number. Whether the truck embraced in plaintiff's chattel mortgage could be identified by the description contained in the mortgage, aided by inquiry which the mortgage itself suggests, was properly submitted as a question of fact.

The second error assigned is that the evidence is insufficient to sustain the judgment in favor of defendants for \$1,200 by reason of being deprived of the use of the truck in controversy from the date of the seizure until the date of the verdict. There was some evidence offered by defendants as to the reasonable rental value of the truck per day during the seven months it was detained by plaintiff. The rule is that, where the property replevied and delivered to plaintiff has

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a value on account of the use to which it may be put, other than its value for sale or consumption, the defendant, if successful, may recover the value of the use of the property during the time it was unlawfully withheld from him under the writ. *Schrandt v. Young*, 62 Neb. 254; *Blodgett v. Rheinschild*, 56 Cal. App. 728. However in the case of an automobile, there is a depreciation during use which lessens its value materially. The plaintiff, under its replevin bond, if unsuccessful, is required to redeliver the property to defendants without depreciation. *Wallace v. Cox*, 100 Neb. 601. To charge the plaintiff for the reasonable rental value of the property without deducting for depreciation and also to collect damages for depreciation from plaintiff on redelivery of the property would be exacting double damages. In the case of *Puckett v. Hopkins*, 63 Mont. 137, it was held that the measure of damages for wrongful detention of an automobile is the net usable value of the car, less depreciation which would have ensued from its use during its detention, and that an instruction which failed to so limit the measure of damages was erroneous. No such instruction limiting damages was given in this case, nor is there any evidence as to the net usable value of the car, less depreciation, during the period it was withheld from defendants. The evidence will not sustain a verdict for damages in the sum of \$1,200 for loss of the usable value of the truck.

On account of the error in entering judgment on the verdict for \$1,200 as damages sustained by Murphy & Murphy, because they were deprived of the use of the truck, the judgment below is reversed.

In view of the failure of proof relating to damages resulting from the wrongful conduct of plaintiff in procuring the writ of replevin, by which defendants were deprived of the use of the truck, the trial court, on the verdict of the jury, should have adjudged that defendants have a return of the truck and, for the wrongful de-

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tention, damages equivalent to the interest on the valuation of \$1,500 at the rate of 7 per cent. per annum from June 7, 1920, to the date of the return; or, in case a return cannot be had, that defendants recover of plaintiff \$1,500 with interest thereon at the rate of 7 per cent. per annum from the date of the wrongful seizure, June 7, 1920, to the date of the rendering of judgment, July 22, 1921; that defendants, as a condition of overruling the motion for a new trial, remit from the verdict the award of \$1,200, less interest at the rate of 7 per cent. per annum on \$1,500 from June 7, 1920, to the date of the rendering of the judgment, July 22, 1921; that, in case defendants refuse to file said remittitur, a new trial be granted. For the purpose of entering such a judgment on the verdict the cause is remanded to the district court.

REVERSED AND REMANDED, WITH DIRECTIONS.

HARVEY LINDLEY ET AL., APPELLEES, V. WARREN E.
WRIGHT, APPELLANT.

FILED JUNE 27, 1923. No. 22426.

1. **Landlord and Tenant: VOLUNTEER CROPS.** A farm tenant whose lease covered the crop year of 1919 and expired March 1, 1920, had, as such tenant, no interest in a volunteer wheat crop produced and maturing in 1920 on the ground from which he harvested the wheat the previous year.
2. **Statute of Frauds: TENANCY: ORAL AGREEMENT.** Evidence and offers of proof examined, and *held* insufficient to take the claimed oral agreement for future tenancy out of the operation of the statute of frauds.

APPEAL from the district court for Deuel county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

Hainer, Craft, Edgerton & Fraizer, for appellant.

L. O. Pfeiffer, *contra*.

Heard before MORRISSEY, C. J., LETTON, ROSE and DEAN, JJ., BLACKLEDGE, District Judge.

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BLACKLEDGE, District Judge.

This is an action of replevin instituted by Johnson, the landowner, and Lindley, his lessee, as plaintiffs, against defendant, Wright, to recover possession of a crop of wheat grown and standing in shock upon the land in Deuel county.

The controversy submitted arises from these facts: That for the previous year one Castle held a lease for the land expiring March 1, 1920, and had fall wheat growing thereon in the year 1919, when he sold the same to Wright, who took charge of the crop and about July 7, 1919, commenced harvesting the wheat with a machine known as a "combine," which both harvested and threshed the grain. The harvesting lasted for a period of eight or nine days. Afterwards the defendant allowed his machinery to remain on the land until in September, following, when he removed the same. Soon thereafter he went to California, where he remained for the winter and spring, returning to the vicinity of this land July 6, 1920. In the meantime Johnson, the landowner, in February executed a lease to his coplaintiff, Lindley, for the land for a term of years beginning March 1, 1920. The lease to Lindley provided that the land should be summer-tilled in the summer of 1920. It is claimed on the part of plaintiffs that sometime in April, upon Lindley taking his machinery to the land for the purpose of commencing the cultivation, it was noticed by him that there was apparently coming upon it a crop of volunteer wheat, and that he and Johnson, after waiting for some time to see whether the wheat developed, concluded early in June to let it stand for the purpose of making a crop of volunteer wheat, which they would harvest and divide the proceeds between them, and that they by oral agreement modified their lease accordingly.

Upon the return of defendant, Wright, from California, about July 6, he examined the wheat in the field and proceeded upon the following day or a day later to put in

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his machinery and commenced to harvest it. In this operation he was interrupted by the service of an injunctive order issued in a case commenced by these plaintiffs against him. This order, however, was later dissolved, and upon its dissolution plaintiffs instituted this action of replevin for possession of the wheat, threshed and marketed it to the amount of some 4,300 bushels, then of the value of approximately \$2.25 a bushel.

The contention of the defendant upon which he bases his claim of title to the wheat is, as disclosed by his offer of proof, that on July 10, 1919, while he was engaged in harvesting, he and Johnson had a conversation, wherein "Wright said to Johnson that he would like to have the land to put back into wheat, to seed it back into wheat; that the said Johnson said to the said Wright that that was all right with him, that he should go ahead and put it back into wheat, and that he would leave it to his judgment how the land was to be put into wheat; that in the course of the conversation the defendant Wright asked Mr. Johnson if it would be all right to disc it back into wheat, and the said Johnson replied that it had been plowed the year before and the ground was in good condition, and as far as he was concerned he would leave it to Wright's judgment; that during the conversation the said Johnson said positively that it was all right with him for Wright to put the land into wheat."

Upon the trial the district court excluded this evidence offered by defendant upon the theory that it tended only to establish an oral contract for a lease to begin in the future, and which contract, whether a modification of the original lease with Castle or a new and subsequent agreement, was required by law to be in writing, and that there had been no part performance thereof shown or other matter sufficient to take the agreement out of the operation of the statute of frauds.

Some other offers of proof were made in the course of the trial, being of circumstances or other conversations

claimed to be corroborative of the claims of defendant, which were excluded by the trial court. As to some of these we are of opinion that the court came dangerously near to hewing over the line and excluding matters which might have been competent, but the case of the defendant must rest in that regard upon his own offer of proof as to the basis of his claim, and he cannot make his claim here, or in the trial court, upon a broader basis than is evidence by his offer of proof.

Upon the conclusion of the evidence each party moved for a directed verdict in his favor. The court directed a verdict in favor of the plaintiffs, and judgment was accordingly given.

Some of the offers of proof made tend to support a contention by defendant that he had intentionally set the machine so that it would waste or distribute considerable amounts of wheat rather evenly over the ground and that it was seeded in this manner. There is no dispute that machines of this kind do ordinarily in their operation waste or distribute some of the wheat, as it must be in a thoroughly ripe condition in order to be successfully harvested and threshed by this kind of a machine. There is, however, no offer of proof on defendant's part that he and Johnson agreed that the seeding should be done in this manner or that the machine should be so set for the purpose of seeding it for the next year's crop. Besides, this conversation took place on July 10, at which time defendant had already been engaged in harvesting for three days, and there is no contention that there was any agreement or conversation of any kind covering this prior period nor that there was any different adjustment of the machine made thereafter, nor that the matter of the adjustment or use of the machine for the purpose of seeding was talked over between the parties. One witness, who was employed by defendant, Wright, at the time of harvesting, says that they regulated the combine so that it would scatter the right amount

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of wheat on the ground to be a good volunteer crop; but the defendant, Wright, does not so testify, nor that it was agreed to do so; and no one testifies to the effect that the plaintiff Johnson either agreed to that method or knew that it was being done or attempted, nor is there any offer of proof to that effect.

The court also excluded the offered testimony of another witness of a conversation between the witness and Johnson alleged to have been had on about March 4, 1920, which it will be noted was after the execution of the lease to plaintiff Lindley, to the effect that, in speaking of the wheat, Johnson said to the witness that Wright had some good wheat on this land. But, under the circumstances, and in view of the scope of the other offers of proof made by defendant, we do not believe this ruling was prejudicially erroneous, and such statement, if made, although possibly a declaration against interest, could not avail to make the necessary elements of contract upon which defendant could rely.

Defendant, Wright, does not by his own testimony or that of any of the witnesses for him show that he did anything, other than the claimed adjustment of the combine, in the way of seeding, cultivating or looking after the crop in any way. The land was otherwise unoccupied, and was without improvements except being under fence. When the defendant finished his harvesting and threshing in July, 1919, he left his machinery on the land. He at no time came back to do any work on it. In September he removed his machinery and betook himself to California, leaving nothing, so far as the record discloses, to show that he claimed any interest in or occupation of the land. He had no communication in the meantime with the landowner, and does not appear upon the scene until in July, when he undertakes to harvest and claims this wheat. Even if it be considered an unearned increment of the land, it would properly belong to the landowner and be subject to his disposal, rather

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than that of a tenant whose lease had expired March 1 before.

Defendant objects to the joinder of plaintiffs herein, but is in no position to complain of arrangements between the plaintiffs which are satisfactory to themselves. Upon the whole record, we are satisfied that the judgment of the district court was right, and it is

AFFIRMED.

H. F. WILSON ET AL., EXECUTORS, APPELLEES, V. EDWARD PERRY ET AL., APPELLANTS.

FILED JUNE 27, 1923. No. 22466.

1. **Specific Performance: DEFECTIVE TITLE.** In an equitable action by executors and trustees, appointed by the will of a testator, to require of a purchaser specific performance of their contract for the sale of land in this state, a conveyance was tendered and the action tried prior to the closing of the estate in the county court or rendition of any decree therein determining heirship or directing distribution or assignment of the estate. There was no showing or finding in the conveyance, will or probate proceedings whether the decedent was a married man or had left a surviving widow. *Held*, that the conveyance was not sufficient to require acceptance as passing good and merchantable title.
2. ———: ———. No special equities being pleaded or proved, and such contract containing a clause making time an essential element, in the absence up to and including the time of trial of a showing by the vendor of ability to fully perform, the purchaser will not, over his objection, be required by decree to thereafter, and much later than the date fixed by the contract, accept a conveyance based upon the assumption that a particular finding and decree will be entered in the matter of the estate in the county court.

APPEAL from the district court for Wayne county:
ANSON A. WELCH, JUDGE. *Reversed with directions.*

Kingsbury & Hendrickson, for appellants.

A. R. Davis and *H. E. Siman*, *contra*.

Heard before MORRISSEY, C. J., DAY, ROSE and DEAN, JJ., BLACKLEDGE and COLBY, District Judges.

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BLACKLEDGE, District Judge.

This is an action for specific performance of a contract to sell and convey real estate.

The plaintiffs, as executors and trustees under the will of Phillip Sullivan, deceased, filed their petition, which includes as exhibits a copy of the contract, and transcript of the will and proceedings had in reference thereto in the county court of Wayne county. It appears that Phillip Sullivan died October 5, 1919, seised of the land in controversy. The will was admitted to probate November 7, 1919. The contract was made October 20, 1920, and fixed March 1, 1921, as the date of final performance. It required an abstract showing good title in the estate of Phillip Sullivan and a conveyance to the purchaser in fee simple by good and sufficient deed.

On the date fixed, plaintiffs tendered a deed executed by them "as executors and trustees of the estate," which defendants refused to accept, claiming that the same would not convey a good or merchantable title. Thereupon, March 12, 1921, plaintiffs filed their petition in the district court praying for specific performance. On the same date defendants filed an answer, admitting substantially all the allegations of the petition except that a sufficient conveyance had been tendered or could be given, and prayed for the denial of plaintiffs' petition and the return to them of a cash payment previously made on the contract, of \$6,464.

The case stood in this situation until September 24, 1921, when it was determined by the district court upon the pleadings and a decree entered which finds, among other things, that plaintiffs, as trustees, had power to make the contract, and that upon the entering by the county court of a decree of final distribution in the estate distributing the estate remaining in the hands of the executors to plaintiffs, as trustees and sole devisees, plaintiffs can by their deed as such trustees convey full and perfect title, and that they are entitled to such final decree of distribution in the county court.

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The court thereupon decreed that, upon the rendition of such final decree in the county court and tender by plaintiffs of their deed as such trustees, the defendants should perform their part of the contract by accepting the conveyance and making the payments by cash, notes and mortgage as specified in the contract.

Upon this appeal it is contended by defendants, the appellants: (1) That the plaintiffs have no title as trustees until the administration has been closed by a final decree assigning the property to them as devisees, and that, under the provisions of the will in relation to the property, the offices of executor and trustee are not coexistent; (2) that neither by the will nor otherwise in the probate proceedings has it been designated or determined whether the decedent had been married or left a surviving widow, and that the absence of some adequate determination of this matter rendered the title unmerchantable in its present condition; (3) that the trial court was unauthorized by its decree, of a materially later date than the contract day of performance, to allow the plaintiffs to thereafter perfect their title in the respects complained of, and then require the defendants to accept the same, the contract having specified that time should be an essential element.

The appellees answer: (1) That, because the contract contained the provisions that the cash payment due March 1 "is without interest until maturity and to draw interest at ten per cent. after maturity," the subsequent clause making time of performance an essential element of the contract is thereby rendered nugatory; (2) that, because the will devised the land of the estate to trustees and directed it to be sold and converted by them into money or securities and distributed in such form, an equitable conversion took place and the title vested in the trustees; (3) that, the will having been duly probated, the debts paid, the time for filing claims expired and an order barring claims entered, equity will "look upon that as done which ought to be done" as to a

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decree of distribution and assignment in the county court, and consider it entered, although in point of fact it has not been made or entered.

We may assume that plaintiffs had power to make the contract, and pass over the question as to whether it resided in them as executors or as trustees; also as to whether the will worked an equitable conversion of the property so far as the estate was concerned, for here the question is as to the title to be passed to the defendants and the sufficiency of the conveyance by which it is proposed to be done.

The sufficiency of the conveyance tendered to pass good title is the principal question in the case. We may assume that these plaintiffs took under the will as any other devisees would take. The question remains whether, prior to the final decree of the county court in probate proceedings determining heirship and directing distribution, and without any recitals or finding in the will, or elsewhere in the probate proceedings, as to the domestic condition of the testator, equity should require the acceptance of a conveyance by plaintiffs as trustees. Certainly their power or authority in that regard is no broader than would be that of the testator. We may assume that Phillip Sullivan in life was party to the contract and tendered his deed without covenant or recital as to his domestic condition. It needs no argument to demonstrate that no prudent title examiner would accept it or pass it. True, such defects, usually, however, as to the deeds of some age, are sometimes cured by means of affidavits; but even that is not tendered here, and we take it that, due to the situation of this estate, something more tangible than an *ex parte* affidavit should be had. Nor can we consider the objection upon this ground as unimportant or technical. It is material and substantial. It is for the very purpose of providing against such contingencies that these things are required in probate proceedings, and the purchaser is entitled to have something upon which he can of right rely as a

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protection. The whole matter of the estate still stands with no recital or finding as to the domestic condition of the testator, whether he was married, or has or has not left a widow surviving, and it requires no argument to demonstrate that a conveyance without some such showing in it, or upon which it rests, is not a good or sufficient conveyance.

As to the contention that we should consider that as done which ought to be done, and so assume what sort of decree will be entered in the county court, such rule is sometimes applied to prevent palpable injustice, but we have not known of its being used in aid of a plaintiff who in equity demands specific performance and is himself bound by the rule that, to entitle him to make such demand, he must show that he can perform fully on his part, and that he has been assiduous in the performance of his own contract obligations. We are impressed with the thought that neither this court nor the district court can authoritatively determine in advance what decree shall be entered in that matter in the county court. The county court is the court of original, exclusive and unimpaired jurisdiction in such matters, and may have before it different considerations than appear in this case.

It is also contended, principally upon the clause in the contract hereinbefore mentioned regarding interest after maturity upon the deferred payment, that the subsequent clause in the contract making time an essential element was waived; but it seems apparent from a reading of the provision that it was, by prescribing the highest lawful rate of interest, intended rather in the nature of a penalty against the payer to prevent his default, and does not indicate an intention to abrogate a subsequent clause deliberately inserted in the contract. To hold that such clause canceled the provisions of the subsequent one making time an essential element would be a strained construction. It is the duty of the court, where possible, to give effect to all the provisions of the contract. Neither are we convinced that, over defendant's objection, the trial

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court could in effect properly make a new contract between the parties directing performance upon an ascertained date some time subsequent to the date of decree, September 24, 1921, which itself is nearly seven months subsequent to the date fixed by the contract. No special equities are presented in behalf of either party. Specific performance is not a matter of legal right. The granting or the withholding of the remedy rests in the sound discretion of the court. The plaintiffs, if the contract is not performed, will still have their property. The defendants have never taken possession and no accounting in that regard will be necessary. In argument it was suggested that there has been a decline in the market value of land; but this is not presented by the record for our consideration. If plaintiffs had been assiduous to perform their contract and could have done so, having been advised of defendants' specific objections at least as early as the filing of answer in the case, they might during the pendency of the action from March to September have procured the further decree of the county court and, by supplemental proceedings, presented it to the district court at the time of trial. It is not even alleged in the pleadings in this case that Sullivan was in fact unmarried and left no widow surviving. Whatever may have been the fact as it was locally known or understood, or as it existed, it has not reached the record in this case, and we must determine these questions upon the record as it is before us. No equitable reason is presented why the plaintiffs should be permitted in September, 1921, to perform the contract and require performance from the defendants, and, so far as the record discloses, they are in no better position at this time. The plaintiffs having failed to show themselves entitled to specific performance, and the defendants, resting upon their contract rights, as they may lawfully do, are entitled to a decree canceling the sale contract and for the return to the defendants of the cash payment of \$6,464, with 7 per cent. interest thereon

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from September 24, 1921.

The judgment of the district court is reversed and the cause remanded, with directions to enter a decree in accordance herewith.

REVERSED.

JOHN HOLLEY, APPELLEE, V. OMAHA & COUNCIL BLUFFS
STREET RAILWAY COMPANY, APPELLANT.

FILED JUNE 27, 1923. No. 22472.

1. **Appeal:** HARMLESS ERROR. Erroneous instructions to the jury will not work a reversal of a case unless they are prejudicial to the complaining party. *Rocha v. Payne*, 108 Neb. 246.
2. **Damages.** Award of the jury held not excessive.

APPEAL from the district court for Douglas county:
L. B. DAY, JUDGE. *Affirmed.*

John L. Webster and R. B. Hasselquist, for appellant.

McKenzie, Cox, Burton & Harris, contra.

Heard before MORRISSEY, C. J., LETTON and ALDRICH,
JJ., BLACKLEDGE and COLBY, District Judges.

BLACKLEDGE, District Judge.

This action is by the plaintiff to recover of the street railway company for injuries alleged to have been negligently inflicted by the premature starting of a street car with a sudden jerk while plaintiff was in the act of alighting, thereby throwing him to the street and injuring his hip and leg. The defendant in its answer pleads: (1) A denial. (2) That plaintiff alighted in safety and took several steps away from the car and then slipped upon ice or snow and fell to the street.

There was a verdict and judgment for plaintiff. Upon the trial the court instructed as to the elements of the case which plaintiff was required to establish by a preponderance of the evidence in order to entitle him to a recovery, and of the general charge no complaint is made. The court also instructed upon the special features of the case, giving instruction No. 4, which in

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substance is that, if the jury believed plaintiff safely alighted from the car and later slipped and fell on the street from any cause aside from the negligence of the defendant in the operation of its street car, then the plaintiff could not recover and the verdict must be for the defendant. Also instruction No. 8 in which it was stated that the only ground of negligence charged by plaintiff was that defendant, through its employees, started the car forward while plaintiff was in the act of alighting from the car, which had stopped to discharge passengers, and that the burden of proof was on the plaintiff to prove these acts of negligence by a preponderance of the evidence; and, if he failed to do so, he could not recover and the verdict should be for the defendant. The court further instructed in reference to an alleged diseased condition of plaintiff, sought to be established by defendant at the trial, and withdrew from the consideration of the jury, as being without sufficient evidence to support it, plaintiff's claim that the car doors were closed and the steps folded up while he was in the act of alighting.

The complaint here made, and principally relied upon in this appeal, is as to the giving of instruction No. 5 by the court, which submitted the matter of comparative negligence to the jury. It is contended that there was no contributory negligence pleaded or proved in the case, and hence no authority for the introduction of the doctrine of comparative negligence.

The defendant's theory of the case was presented to the jury, both affirmatively and negatively, by instructions Nos. 4 and 8, above noted, and it was therein stated, respectively, that if the finding was in favor of defendant's contention or if the plaintiff failed in proof as to his contention, in either event the verdict should be for the defendant. The argument is that, nevertheless, the instruction criticized would submit to the jury an issue not raised by the pleadings or evidence, and is therefore ground for reversal. It is much easier to keep these

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theories of the case separate and distinct upon paper in the pleadings than upon the evidence. In view of the provisions of our statute (Comp. St. 1922, sec. 8834), whereby slight negligence of the plaintiff is no longer a defense but goes only to mitigation of damages, we are not convinced that it is necessary to be presented in the pleadings. *Pittsburgh, C., C. & St. L. R. Co. v. Cole*, 260 Fed. 357; *Kansas City S. R. Co. v. Jones*, 241 U. S. 181.

Defendant does not show how it was, or could have been, prejudiced by the giving of the instruction, or how the jury could have been misled thereby to defendant's injury, but argues that prejudice must be presumed, citing *White v. Trinidad*, 10 Colo. App. 327. That case, however, was upon an appeal by a defeated plaintiff; and it is easy to see how the giving of such an instruction under like circumstances might be prejudicial to plaintiff who was suing to recover. In the instant case, assuming, as we must, that the jury followed the instruction given, which was as plain and unambiguous in its terms as the wording of the statute permits, its only effect could have been to cause a diminution of the amount of plaintiff's recovery, the jury having failed to adopt defendant's theory as to the facts, and of this the defendant is in no position to complain.

The case of *Hatton v. Hodell Furniture Co.*, 72 Ind. App. 357, cited by appellant, holds that the giving of an instruction outside the issues is reversible error, "unless it clearly appears that the complaining party is not harmed." This court in *Webb v. Omaha & S. I. R. Co.*, 101 Neb. 596, held: "The giving of erroneous instructions is not cause for reversal, if the instructions are more favorable to the complaining party than he is entitled to under the law." And in *Rocha v. Payne*, 108 Neb. 246; "Erroneous instructions * * * will not work a reversal of a case unless they are prejudicial to the complaining party." To the same effect are the decisions upon similar propositions in *McCarthy v. Village of Ravenna*, 99 Neb.

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674, *Fitzgerald v. Meyer*, 37 Neb. 50, and *City of South Omaha v. Fennell*, 4 Neb. (Unof.) 427. This assignment must therefore be overruled.

Defendant further contends that there was error in stating, in an instruction defining the issues, the amount for which plaintiff sued. This has been the general practice in the district courts of the state for many years. We think it is not to be commended and is often unwise; but in this case we do not think it authorizes a reversal.

There is further contention that the verdict for \$5,000 in plaintiff's favor was excessive. The jury found in favor of plaintiff's claims as to his physical condition and as to his injury. It appears thereby that he was, prior to the injury, an able-bodied laborer, a married man, of some skill and industry, 38 years of age, and by the injury has suffered a paralysis of his left leg necessitating the constant use of a cane in moving about, and from which, a qualified physician and surgeon states, he will probably never recover. This award as made by the jury passed the scrutiny of the trial court, and we cannot hold that it is excessive.

The judgment of the district court is therefore

AFFIRMED.

HERMAN G. WEILAGE ET AL., APPELLEES, V. CITY OF CRETE
ET AL., APPELLANTS: ALLIED CONTRACTORS,
INTERVENER, APPELLANT.

FILED JUNE 27, 1923. No. 23009.

1. **Municipal Corporations:** MINISTERIAL ACTS: RESOLUTIONS. In the exercise by the city of the second class of its corporate functions, where the statute definitely prescribes a method of action, such method must be followed. Where this is not done, if the action taken by the city amounts to prescribing a permanent rule of conduct which is thereafter to be observed by the inhabitants of the city, or by the officers in the transaction of the corporate business, then the rule prescribed may be more properly expressed in the form of an ordinance; but it is entirely proper to act by resolution, if the

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action taken is merely declaratory of the will of the corporation in a given matter, and is in the nature of a ministerial act.

2. ———: ASSESSMENTS: COLLATERAL ATTACK. Where, in the making of assessments for local improvements and the levy therefor, property owners have opportunity to present their objections to the municipal body and to there have a hearing and pursue proceedings for review of the final decision of that body whether by error or appeal, they cannot fail to do so and then, in the absence of a substantial jurisdictional defect in the proceedings, question the proceedings collaterally by an independent suit to restrain the making of the levy.

APPEAL from the district court for Saline county:

LEONARD W. COLBY, JUDGE. *Reversed and dismissed.*

Glenn N. Venrick and John E. Mekota, for appellants.

McKenzie, Cox, Burton & Harris, for Intervener.

George H. Hastings, Robert R. Hastings, Stewart, Perry & Stewart and T. J. Dredla, for appellees.

Heard before MORRISSEY, C. J., LETTON, DEAN and GOOD, JJ., BLACKLEDGE, District Judge.

BLACKLEDGE, District Judge.

In this an injunction suit the plaintiffs, some 90 in number, seek to restrain the defendant city and its officers from levying and collecting a special assessment upon certain of the real estate within the city of Crete, and within a designated sewer district, assessed for the purpose of being applied toward payment of the cost of construction of a storm sewer in the city to drain one of its principal streets. The city by its proper officers had taken the proceedings designated by chapter 189, laws 1919, for the purpose of constructing the sewer, and had substantially followed the same until it received a certificate of completion from the engineer with a statement of the costs and proposed assessments against the several pieces of property, including that of the plaintiffs, and had given notice and had a hearing thereon at which the proposed assessments against the several properties were approved. Up to this point there is no dispute as to the facts and no claim on the part of the

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plaintiffs of serious irregularity or defect in the proceedings.

At the hearing before the council in reference to the adoption of this proposed assessment, the plaintiffs appeared, made and filed written objections to the proceedings, alleging substantially the same grounds as are alleged in the petition as grounds for this action, none of which are urged upon this appeal except that of gross injustice in some of the amounts charged against the respective properties, and that certain of the property included in the district is not assessed for any amount.

The plaintiffs base their claim of right to the restraining order principally, and upon the oral argument and submission of the case wholly, upon the ground that the city council assumed, following such hearing and the adoption of the proposed assessment, to make the levy for the amounts of the assessment by resolution, and not by ordinance. They contend that the levy could be made only by ordinance, and that, not having been so made, the want of the ordinance is a fatal jurisdictional defect in the proceedings, and that the whole matter of the assessments and disposition thereof as against their several properties should therefore be set aside, and are now in this action the subject of inquiry and adjudication as to their fairness and justness. Upon the other hand, the defendant city and the contractors, who were allowed to intervene in the case, contend that no jurisdictional defect exists or has been pointed out; that, in the absence of such jurisdictional defect as would render the proceedings based thereon void, the proceedings are not subject to this, a collateral attack by an independent action, and that, even if such an inquiry be allowed, it would not extend farther back into the proceedings than to making of the levy, which, if it should be held must be by ordinance rather than by resolution, could yet be made and proceedings had from that point onward without affecting the earlier proceedings in the matter.

We will consider first whether the failure to enact an

ordinance making the levy is such a fatal defect as to render the proceedings void. In adopting the resolution of necessity and in the other proceedings up to the time of the hearing and adoption of the proposed assessment, although many objections are alleged in the petition, none are now insisted upon and the provisions of the act of 1919 seem to have been substantially followed. We may concede that the evidence shows some apparent inequalities and injustices in the matter of spreading this assessment against the respective properties, but that was a matter which was properly before the council for hearing and determination and was by that body determined, and properly to be determined, prior to the adoption of the ordinance which plaintiffs contend should have been adopted. Before either ordinance or resolution could be adopted making the levy, the assessment itself must have been made, and this involves a determination of the property to be assessed and the specific amounts chargeable against the several lots and tracts. We fail to see therefore, and it has not been pointed out to us in the briefs or argument, how the enactment or non-enactment of an ordinance subsequent thereto could have relation back so as to invalidate or control proceedings theretofore had, and which were conducted, so far as appears, in conformity with the statutory provisions. If the ordinance was a necessity and jurisdictional in its nature, it seems that its presence or absence could affect only subsequent proceedings to be based thereon.

Passing this point, however, we are not convinced that the making of the levy could be done in this instance by ordinance only. The plaintiffs base their contention upon a construction of sections 4278, 4281, 4282, Comp. St. 1922, which are respectively 5105, 5108, 5109, Rev. St. 1913. They contend that the preamble (4278) to the effect that the city "may enact ordinances for the following purposes," followed by the other subdivisions, limits the authority of the city so that it can act in such matters by ordinance only; and that the clause, "to make all such or-

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dinances," in section 4279, further indicates an intention to so limit the power.

In reference thereto it is well to note the relation of section 4279 to the other subdivisions with which it is connected. For this purpose, going back to the original act of 1879 (Laws 1879, p. 213), it will be seen that this section, which as placed in the revision now precedes all other subdivisions, was originally number 12 in the list, and was so carried through the laws of 1885 and 1887, and perhaps others. A reading of this, therefore, in connection with its context shows that the section originally provided that the city should enact ordinances (1) to levy taxes for general revenue purposes; (2) to levy any other tax or special assessment authorized by law; (3) to provide for grading and repair of streets; (4) to construct sidewalks. etc., and so continuing until, having made 11 specific provisions, this section (4279) then follows as number 12, authorizing the city, further: "To make all such ordinances, by-laws, rules, regulations and resolutions, not inconsistent with the laws of the state, as may be expedient, in addition to the special powers in this chapter granted, for maintaining the peace, good government, and welfare of the corporation, and its trade, commerce, and manufactories."

It thus appears to be the purpose of this subdivision to, in a measure at least, enlarge the powers of the city authorizing it to act in the manner there stated and upon subjects in addition to the specific things before stated. The subdivision, therefore, instead of being a limitation upon the power of the municipal authorities to act, is an extension of power; and specifically mentions a resolution as one means of acting in a proper case.

It has been several times held by this court, and is, we think, the universal doctrine, that where the statute definitely prescribes a method of action, that method must be followed. Where this is not done, if the action taken by the municipality amounts to prescribing a permanent rule of conduct which is thereafter to be observed by the

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inhabitants of the municipality, or by its officers in the transaction of the corporate business, then the rule prescribed may be more properly expressed in the form of an ordinance; but it is entirely proper to act by resolution, if the action taken is merely declaratory of the will of the corporation in a given matter, and is in the nature of a ministerial act. *McGavock v. City of Omaha*, 40 Neb. 64.

It is also contended that section 4281, a subdivision under the general section 4278, providing, "To levy any other tax or special assessment authorized by law," controls as to the making of a special assessment in this case. This court in *Lincoln Street R. Co. v. City of Lincoln*, 61 Neb. 109, 145, specifically held that by this subdivision "is evidently meant such special assessments and taxes the levying or imposition of which is to be performed by an independent act or ordinance, complete in itself, and of such taxes as are more permanent and continuing in their nature than those of special assessments for local improvements."

In *McGavock v. City of Omaha*, *supra*, a resolution was held to be sufficient as the method of establishing a street grade. In *Lincoln Street R. Co. v. City of Lincoln*, *supra*, a resolution was held sufficient whereby to make the final levy for paving, and that an independent ordinance therefor was not required. In *Van Valkenberg v. Rutherford*, 92 Neb. 803, a resolution was held sufficient authorization for the transfer of title of real estate, owned by the city, fixing the terms of sale and the making of a deed, and that an ordinance was not required. And in *State v. Marsh*, 106 Neb. 547, following the doctrine of *State v. Babcock*, 20 Neb. 522, this court held a resolution sufficient for the calling of an election to vote bonds for the purpose of maintaining and extending the city water works.

In view of these considerations, we do not believe an ordinance was necessary to the valid making of the levy under consideration. We do not hold that resolutions and ordinances may be used interchangeably, but what we do

decide is, that under the circumstances of this case the making of this final levy was in the nature of a ministerial act, and that the action of the council by resolution for that purpose was not prohibited by law.

Plaintiffs' counsel have presented with considerable force, both in the brief and by oral argument, claims of unjust distribution of the assessments both as to property entirely omitted and as to properties which it is claimed were overcharged; but, in consideration of this phase of the case, it must be remembered that, no fatal defect in the proceedings prior to the time of the levy having been pointed out, the council had jurisdiction to create a sewer district and, necessarily, to define the boundaries thereof. It was also authorized to construct the improvement, and in making the assessment against the properties necessarily had the power and jurisdiction to determine what properties should be assessed and the amount thereof, and what property, if any, in the district should be omitted from the assessment as not receiving special benefits. All these are matters which, under the conceded facts appearing by the record, the council had jurisdiction and power to determine. Having such power, any errors or irregularities in reference to the matters suggested did not furnish ground for an independent suit by injunction. Considerations respecting the topography of the district, the distance of the different lots from the improvement itself, the value of the property, the benefits derived or to be derived therefrom were all matters properly for the consideration of the mayor and council and must be conclusively presumed to have been taken into consideration by them. The plaintiffs urge that there was gross injustice in the distribution and fixing of the amounts to be assessed and in the omission of property from assessment, but they do not charge fraud, do not allege that they were denied a hearing before the municipal body; and in fact the record conclusively shows they had a hearing, and their objections were there heard and overruled. The plaintiffs having thus instituted a direct attack against

the proceedings, and at the hearing having met with an adverse decision by the city council, were authorized, to preserve their evidence, settle their bill of exceptions, and have the case reviewed upon error proceedings in the district court, and ultimately, if they thought proper, in this court. Such was the course pursued by the parties in the recently decided case of *Hurd v. Sanitary Sewer District*, 109 Neb. 384. Instead of pursuing that course, however, these plaintiffs chose to abandon their direct attack and, by the institution of this, a separate and independent suit, make a collateral attack upon the same proceedings, upon substantially the same grounds as were included in their objections filed before the council, with the additional claim only of the invalidity of the levy because made by resolution and not by ordinance.

It has become the well-recognized rule of law in this state that where the parties have an opportunity to be heard, as in this case, and to pursue proceedings for review whether by error or appeal, they cannot fail to do so and then, in the absence of a substantial jurisdictional defect in the proceedings, obtain relief by means of such collateral attack. This rule we take it is well settled in this state, and has been applied in *Diederich v. City of Red Cloud*, 103 Neb. 688; *Hahn System v. Stroud*, 109 Neb. 181; *Wead v. City of Omaha*, 73 Neb. 321; *Morse v. City of Omaha*, 67 Neb. 426; *Portsmouth Savings Bank v. City of Omaha*, 67 Neb. 50; *Webster v. City of Lincoln*, 50 Neb. 1, and in other cases.

It necessarily follows that the plaintiffs are not in a position to test out in this suit either in this court or in the district court the merits of their original claims and objections made before the city council; and that nothing has since occurred in the proceedings which may operate as a foundation for injunctive relief. Even if we are inclined to hold that the actual making of the levy was required to be done by ordinance, rather than by resolution, that could have no retroactive effect so as to open up for investigation the prior proceedings in reference to

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which the plaintiffs permitted the adjudication by the municipal body to become final by failure to prosecute proceedings for review thereof, and relief, if given by setting aside the resolution and allowing the council to reconvene and enact an ordinance for the same purpose, would be of no consequence in its effect upon the rights or the property of the plaintiffs.

It therefore follows from these considerations that the judgment of the district court should be reversed and the cause dismissed.

REVERSED AND DISMISSED.

THOMAS COLLINS, JR., APPELLEE, v. JOHN WEISE, JR.,
APPELLANT.

FILED JUNE 27, 1923. No. 22422.

1. **Negligence: CARE REQUIRED: MINORS.** In determining the degree of care which a boy 16 years of age should exercise, the jury should consider his age, experience, and discretion, as the law does not require of him the same degree of care as it does of an adult, but only such care as one of his own age and experience would ordinarily exercise in his own behalf.
2. **Master and Servant: NEGLIGENCE: QUESTION FOR JURY.** When an inexperienced minor is employed, known by the employer to be such, and put to loading hay and driving a team over dangerous ground, it is the duty of the employer to instruct such youth so that he will understand and appreciate the danger involved and the necessity for the exercise of due care, and if this instruction is not given, and the youth is injured, whether such facts constitute negligence on the part of the employer is a question of fact for the jury.
3. —: **ASSUMPTION OF RISK: QUESTION FOR JURY.** There is no presumption that a boy 16 years of age, who has had little experience as a farm laborer, has as much prudence and understanding as an adult, and where such youth is injured while engaged in dangerous work, which he was ordered to do by his employer's foreman in charge of the work, it is for the jury to say, considering his age and experience, whether he assumed the risks of such employment.

APPEAL from the district court for Boone county: A. M. POST, JUDGE. *Affirmed.*

J. S. Armstrong and Williams & Williams, for appellant.

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Vail & Flory, contra.

Heard before MORRISSEY, C. J., DAY and ALDRICH, JJ., COLBY and REDICK, District Judges.

COLBY, District Judge.

This is an action for damages alleged to have been sustained by the plaintiff while at work on the farm of defendant as a hired man.

The petition alleges, in substance, that on or about September 14, 1920, and prior thereto the defendant was a farmer engaged in farming in Boone county, and the plaintiff an infant of 16 years, and that on said date the plaintiff was employed, through his father, by defendant to work as a farm hand; that the plaintiff had never been employed to do work of that character, and was wholly ignorant of the proper tools to work with and wholly inexperienced in farm work; that when defendant hired plaintiff he was told by plaintiff's father that plaintiff had never had any experience in driving a team or as a farm laborer, and defendant agreed to look after the teams to be used by plaintiff, and see that he was furnished with a good, reliable team and shown how to handle the team in a safe and careful manner; that defendant put plaintiff to work hauling hay with a team and rack with one Rudolph Hartman, a man 27 years of age, as manager or foreman; that defendant directed the plaintiff to follow the instructions of Hartman as to driving while hauling hay, and to perform his labor in the manner pointed out and to do his work and to get instructions from him as to his farm work; that it was the duty of defendant to provide a skilful and competent man to direct plaintiff in his work when defendant was not with him, but that the defendant, regardless of his duties, negligently and carelessly employed Hartman to supervise and direct the manner of plaintiff's work; that on said September 14, 1920, while the plaintiff was driving a team and hayrack loaded with hay under the direction of the said Hartman over and along a steep and rough hillside, the hayrack tipped over,

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compelling plaintiff to jump to the ground, and that in so jumping plaintiff broke his leg in three places between the knee and ankle; that he was seriously and permanently injured and his body otherwise bruised thereby, from which injuries he became and continued to be sick and lame, suffered and still suffers great pain and distress; that such accident and injury were caused by the negligence of said Hartman as foreman of defendant; that the plaintiff, by reason thereof, has been unable to perform any duties as a laborer; that his earning ability, prior to said injury, was \$80 a month; that plaintiff has been compelled to pay for medicines, doctors' bills and hospital bills in the sum of \$279.16, and the sum of \$100 for expenses to Columbus for consultation and entering the hospital there; and that plaintiff was injured in the sum of \$10,000, for which he prayed judgment.

The answer is substantially as follows: Defendant admitted that the plaintiff sustained an injury while in the employ of defendant; alleged that plaintiff was well acquainted with all matters pertaining to his employment by defendant, the character of the ground where he was working and the dangers incident thereto, and had a full understanding of the work, and that he continued such work with such understanding; that the alleged injuries received by plaintiff were the result of the risks naturally and ordinarily incident to the work in which he was engaged, and that such injury was assumed by the plaintiff by virtue of his employment; that plaintiff's injury was treated by Dr. Evans of Columbus, Nebraska, and that the plaintiff was in the hospital from September 14, 1920, to October, 1920, when he was discharged and sent home, when the bones were still soft and his ankle in the plaster cast; that afterwards an elastic bandage was substituted, with instructions by the surgeon to be careful and wear a shoe with braces; that plaintiff negligently and carelessly, contrary to such instructions, engaged in wrestling and other rough sports, failed to brace his ankle as

instructed, and thereby caused the injuries complained of; that said injuries received by plaintiff were due to his own carelessness and negligence, and not through any act on the part of the defendant, and that plaintiff's acts were the direct and proximate cause of the injury. The defendant further denied each allegation in the petition not admitted in his answer.

The plaintiff, for reply to defendant's answer, admitted the facts therein as alleged in his petition; but denied all other matters alleged in said answer.

Under the instructions of the court the case was submitted to the jury, who rendered a verdict in favor of plaintiff in the sum of \$1,000. A motion for new trial was filed by defendant, overruled, and judgment rendered for the amount of the verdict, and the case is brought to this court by defendant for reversal upon errors assigned.

The first errors in appellant's assignment which we will consider are that the verdict is not sustained by sufficient evidence, is against the weight of the evidence, and is contrary to law.

It is urged by counsel for defendant that it appears of record that defendant furnished plaintiff a gentle team, and an experienced man to assist and direct him; that the plaintiff knew the ground over which they were driving, had raked the hay thereon previously, and that the way was open for him and he was told where to drive by the foreman, so that nothing was left undone that could have been done by any reasonable and prudent man for plaintiff's protection; that plaintiff was a boy 16 years of age and was presumed to know that it was dangerous to drive on a hillside, as this would cause the wagon to upset; that the plaintiff had arrived at sufficient years of discretion so that he should have known the dangers incident to driving over ruts, mounds and cat-steps that existed along this hillside, and that the defendant was not obliged to tell plaintiff that it was dangerous to drive over these depressions and elevations

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in his road and that he would upset if he did; that the upsetting of the hayrack was caused by the carelessness and negligence of the plaintiff, who should have known the danger incident to driving on a rough hillside, and that the injuries complained of were caused by his own carelessness and negligence.

A consideration of the record and of the evidence introduced does not bear out counsels' statement or convince this court that the injury was caused by the plaintiff's carelessness and negligence, but on the contrary it plainly appears that the road on the hillside along which the plaintiff was directed to drive the team and wagon was in a very dangerous condition; that the mounds and other elevations, ranging over four inches in height in some places, with corresponding depressions in other places, required a skilful and experienced driver, using more than ordinary care and having an accurate knowledge of the roadway.

On its face, under the evidence, it was a difficult and dangerous place to drive and the 16-year-old boy should have been very carefully guarded and instructed by the defendant or his foreman before being permitted to load the hay and drive the team over such a road. No 16-year-old boy could be presumed to have the knowledge and experience necessary to make such a drive in safety, and the evidence shows that the plaintiff was inexperienced in farm work, in driving a team, and in the use of wagons, hayracks and other farm machinery, and had had no experience in driving a team and load of hay on a hillside full of obstructions and depressions that made it unsafe even in the hands of a mature and experienced farmer. The evidence does not show that the defendant or his foreman properly instructed, advised or guarded the youthful and inexperienced plaintiff, or informed him of the dangers of the way.

It seems to this court that on the very face of the evidence the defendant was guilty of almost criminal negligence, and that the testimony was amply sufficient to

support the verdict of the jury, who would have been fully justified in finding for the plaintiff in a much larger amount of damages.

The appellant's next assignment is for errors occurring at the time of the trial objected to by the defendant.

Under this heading counsel for defendant make only the general objection in the assignment of errors and do not call the court's attention to any especially objectionable ruling in the exclusion or admission of evidence made by the lower court during the trial, hence it does not seem necessary for this court to invade the record for the purpose of finding errors in the introduction of evidence which the defendant has not seen fit to point out or specially call this court's attention to.

The remaining assignments of errors from the fifth to the fourteenth, inclusive, are directed toward the instructions given by the court on its own motion or at the request of plaintiff.

Of these instructions the first to which the court's attention is called is number 6, and the objection to it, as set forth, is that it is nowhere alleged in the petition that the work in which the plaintiff was engaged in defendant's behalf was hazardous, and that the plaintiff, being at work as a farm laborer, was not engaged in a hazardous occupation.

Defendant's counsel urged that this instruction was misleading and prejudicial to defendant's cause, because the word "hazardous" is defined to mean "involving danger accompanied with risk," and so a hazardous occupation would be a dangerous occupation, and that no court has so defined work upon a farm.

This argument of defendant's counsel does not appeal strongly to this court. The district court instructed the jury that the work in which plaintiff was engaged in defendant's behalf was hazardous. In this we perceive no error. The evidence shows that the immature youth of 16 years of age was put to work loading hay and driving

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a team on a steep hillside, in which he was obliged to load hay and drive over an unknown track occupied and interspersed with mounds, gullies and cat-steps sufficient in size to overturn the wagon, unless the greatest diligence and care were used in its management. It further appears that no information was given as to these obstructions by the foreman to the inexperienced boy, who was loading hay on the rack, except to have the team follow along after him through the spaces where he was dividing the windrows, and that no instructions were given as to the dangers naturally arising from driving along a rough and almost impassable roadway. The instruction of the court in assuming that this work of driving the wagon along this dangerous and almost impassable roadway was hazardous is certainly within the evidence, and the jury could not have been misled by any general terms when they had the facts so plainly given them in the undisputed evidence. The instruction does not say to the jury that the work as a farm laborer, in general, is a hazardous occupation, but simply that this work in which the plaintiff was engaged in defendant's behalf in driving this team over this dangerous road was hazardous. Nor did the court say that hauling hay was a dangerous occupation, but certainly it must have appeared to the court, as well as to the jury, that hauling hay over this road with its mounds, gullies, cat-steps and obstructions was a hazardous occupation to a grownup, experienced man and much more so to an inexperienced boy of 16.

The next assignment of errors urged by counsel for defendant is contained in instruction No. 9, in which the court uses the expression, in referring to plaintiff, as "a youth of tender years," and the objection is made that the use of the word "tender" in the instruction was misleading, and that the word should be used only regarding persons under the age of 14 years, and that this instruction may have caused the jury to believe that they were to judge the plaintiff as they would a small child.

This is not a correct interpretation of this instruction. The law makes every child, during his minority, a person of tender years; that is, a person whom the law, especially in certain things, provides for and protects. He is not allowed to act on his own free will, make contracts or do the things which are part of the qualifications of one who has attained his majority, and in this case the jury could not have been misled.

The evidence discloses that the mother of plaintiff, at the time the defendant hired him, told defendant that he had had no experience in the farming business and would have to be taken care of, and that the father of plaintiff made stronger statements at such time. Not only this, but the plaintiff himself was on the witness-stand and testified and was subject to the inspection and view of the court, the lawyers and all the members of the jury. The jury had the opportunity and undoubtedly did personally observe the appearance, character and physical and mental development of plaintiff, and no mere statement of a matter of law or fact in the court's instructions referring to him as a youth of tender years could have had any material bearing on the minds of the jury, so as to induce them to regard plaintiff as they would a small child. The distinction which counsel for defendant attempt to make that the instruction would be applicable to a child under 14 years of age, but not to one of 16 years or over, has no sound foundation in law. It is a matter of physical and mental development, not a question of years, and we see nothing misleading about the instruction as given.

The next objection urged by defendant's counsel is the giving of instruction No. 1 asked by the plaintiff. It is contended that in this instruction the court presupposes that there was evidence that this land was dangerous for any one to drive a wagon-load of hay over, and also that there was evidence that the employment of plaintiff at the time of his injury was dangerous, when, as a matter of fact, there was no such evidence; and, further, that such

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instruction assumed that the defendant knew or should have known the danger of operating a team on such land; but counsel for defendant admit that these objections are partially done away with when the whole instruction is read. In the latter part of the instruction the court used the following language:

"If you find from the evidence that the employment of plaintiff at the time of his injury was dangerous, and that the plaintiff was known to be inexperienced, and that the defendant knew the danger or should have known the danger to which plaintiff would be exposed, and did not give him sufficient instruction therein, and if he from youth or inexperience failed to appreciate the danger and was injured in consequence thereof, and because of defendant's negligence, and the plaintiff was not guilty of contributory negligence, then the defendant is responsible and your verdict should be for the plaintiff."

This instruction, taken as a whole, is based upon and authorized by the evidence and fairly states the law applicable to this case. It conclusively appears from the testimony that the employment of plaintiff in driving the team over the rough road on the side-hill with its mounds, cat-steps and ditches was dangerous; it also appears that the plaintiff was inexperienced; that defendant had been told so by both plaintiff's father and mother at the time of his employment; that the defendant, being the owner of the land, knew the danger or should have known of the danger to which the plaintiff would be exposed; and there is no evidence that any sufficient instruction was given plaintiff by the defendant or his foreman or that plaintiff was in any way advised of the dangers confronting him.

Counsel for defendant next object to instruction No. 5, given by the court at the request of plaintiff, in the following language:

"You are instructed that there is no presumption that a young man 16 years of age, who had never had any

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experience as a farm laborer, has as much prudence and understanding as an adult, and where such youth has been injured while engaged in dangerous work, by driving over dangerous ground upon a load of hay which he has been commanded to do by the master's foreman in charge of the work, it is for the jury to say, considering his age and experience, whether he assumes the risk of employment."

The authorities cited by defendant's counsel do not establish the fact that there is a presumption that a youth of 16 has as much prudence and understanding as an adult, while engaged in the kind of work he was doing, as claimed by defendant's counsel. We find no authorities sustaining such a presumption. There is no conflict in the evidence as to the hazardous kind of work plaintiff was doing when he received his injury. He was driving a team and load of hay on a steep hillside circling around the hill, following the way marked out and indicated by the foreman. It is proved beyond peradventure that this way leading over rough and dangerous places crossed mounds, depressions, cat-steps and ditches which would require more than ordinary care to prevent the upsetting of the load, and the court had the right to assume from uncontroverted evidence that the plaintiff was engaged in dangerous work by driving over such dangerous ground upon the load of hay, which he was commanded to do by the defendant's foreman. The instruction objected to assumes no more facts than the evidence conclusively shows, and the law stated therein is authorized by the adjudicated cases and is clearly announced.

The authority for the instructions objected to, as given by the district court, is to be found largely in the adjudicated cases of this court.

In *Breedlove v. Gates*, 91 Neb. 765, it is held: "If a servant, on account of his youth, lack of prudence and understanding, and because of want of proper instruction, fails properly to appreciate the risks involved in certain

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labor which he is commanded by the master to perform, and is injured, the master will be liable."

In *Ittner Brick Co. v. Killian*, 67 Neb. 589, it is said: "Youth and inexperience being inherent, and not the result of carelessness or negligence, it is not error to state, in an instruction in an action for personal injuries, that if plaintiff, 'because of his youth and inexperience, failed to appreciate the danger,' without adding 'or by the use of reasonable care on his part could or would not have known it.'" And the court further say: "There is no presumption that a child of 14 years has as much prudence and understanding as an adult, and where such child has been injured while engaged in dangerous work which he has been commanded to do, it is for the jury to say, considering his age and experience, whether he assumed the risks of his employment." The court also stated: "Where a boy 14 years old undertakes dangerous work in obedience to the command of the master, the law will not deny him relief on the ground of contributory negligence, unless the danger was so manifest and glaring that it must have been known to one of his age and experience that he could not do it without injury."

In *Omaha Bottling Co. v. Theiler*, 59 Neb. 257, this court announces the doctrine: "Infants are entitled, however, to warning of dangers which, on account of their youth and inexperience, they do not fully comprehend; and if such warning be not given, or if it be inadequate, the master is in fault and must answer for the consequence."

In *Foley v. California Horseshoe Co.*, 115 Cal. 184, 56 Am. St. Rep. 87, the court say: "A minor cannot be expected to set up his opinion, however mature, against the judgment and experience of those maturer and older to whom he is given in charge, * * * and it would be an extreme case in which a minor should be held guilty of contributory negligence in obeying the orders of his foreman, representing his master."

"The measure of a child's responsibility is his capacity

to see and appreciate danger, and the rule is that, in the absence of clear evidence of the lack of it, he will be held to such measure of discretion as is usual in those of his age and experience. This measure varies of course with each additional year, and the increase of responsibility is gradual. It makes no sudden leap at the age of 14." *Greenway v. Conroy*, 160 Pa. St. 185, 40 Am. St. Rep. 715.

It will be seen that the adjudicated cases cited give a different rule under the law as to negligence and contributory negligence of a master and a minor servant, distinguishing a minor servant and the law applicable to his recovery from an adult servant.

In the instant case it does not appear from the evidence that any warning whatever was given plaintiff by the defendant or his foreman of the danger of driving a wagon along the steep hillside and the rough, dangerous and almost impassable roadway, the foreman telling plaintiff only to keep his team going or the wagon will tip over, and it appears that a six-inch hillock on the side of the steep ground was sufficient to overturn the wagon.

The evidence shows beyond question that the appellee was inexperienced as a farm hand, and knew nothing about the hillside on which he was driving except what he had learned in raking hay in that vicinity; the foreman went ahead, parted the windrows and directed the boy to drive on and keep the team going. The foreman in charge of the work certainly could see and must have known all about the mounds, depressions and obstructions along the way, but there is no evidence that the plaintiff was given any information on this subject. The immature youth had never had any experience in hauling hay over rough ground and could not have known the danger. He was not instructed that the land over which he was ordered to drive was dangerously rough, that he would have to act with great care and look out for the bad places, and that the wagon was liable to overturn.

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He was not given the least warning to stop the wagon before the wheels struck the mounds or cat-steps and tipped the wagon over. It convincingly appears that an ordinarily prudent and experienced foreman would have instructed the boy on all of those matters and would have commanded him what to do and what not to do in order to avoid the dangers that were necessarily to be encountered in the work he was ordered to do.

From a consideration of the instructions given by the district court, we believe that the jury were properly charged in the matter of the law applicable to the case, and that from an examination of the testimony appearing in the record the jury were fully justified in finding for plaintiff under the law and the evidence.

The proceedings and judgment of the district court should be and are

AFFIRMED.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL,
APPELLEE, V. BANKING HOUSE OF A. CASTETTER, AP-
PELLEE: PLATEAU STATE BANK, APPELLANT:
JAMES E. HART, RECEIVER, APPELLEE.

FILED JUNE 27, 1923. No. 22441.

1. **Banks and Banking: GUARANTY FUND: "DEPOSIT."** Under the facts stated in the opinion, *held* that the transaction constituted a deposit within the meaning of the depositors' guaranty fund act.
2. ———: ———: ———: **EXCESSIVE INTEREST.** A deposit represented by a cashier's check payable at a future date, and which includes interest at a rate in excess of that allowed by law, is not within the protection of the depositors' guaranty fund act.

APPEAL from the district court for Washington county:
L. B. DAY, JUDGE. *Affirmed.*

E. B. Carrigan and Brogan, Ellick & Raymond, for appellant.

Gaines, Van Orsdel & Gaines, contra.

Heard before MORRISSEY, C. J., ROSE and ALDRICH, JJ.,
COLBY and REDICK, District Judges.

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REDICK, District Judge.

Application of the Plateau State Bank for payment from the state depositors' guaranty fund of the sum of \$1,323.30, alleged to have been a deposit with the Banking House of A. Castetter at the time of its failure, March 4, 1921. The facts are not in dispute and may be briefly summarized as follows:

In October, 1919, the applicant held two notes of Claude Hauschildt aggregating about \$1,734.52, drawing 8 per cent. interest, and was insisting upon payment, and the Castetter bank, of which Hauschildt was a customer, for the purpose of assisting him and preventing immediate enforcement of the notes, guaranteed their payment to the applicant. The amount due upon the notes was reduced by payments made by Castetter bank until, on January 15, 1921, there was a balance of \$1,292.31, and interest at 8 per cent. from December 14, 1920. After the guaranty all transactions were between the two banks, and applicant looked exclusively to the Castetter bank for payment. Several letters were written by applicant to Castetter bank requesting payment as per guaranty (the notes matured July 1, 1920), and finally a payment of \$500 was made March 22, 1920, which operated as an extension to December 14, 1920. December 18, 1920, applicant wrote asking payment of \$500, and agreeing to carry the balance for Castetter bank a few weeks. The payment was not made and January 12, 1921, applicant wrote the following letter:

"Pursuant to our conversation of a few days ago pertaining particularly to the two notes of Claude Hauschildt for \$1,485.00 and \$249.52, of which there is an unpaid balance of \$1,292.31, and accrued interest from December 14, 1920, we have decided to leniently observe the position of your bank inasmuch as you indicated to me that you were 'hard up,' notwithstanding the fact that you signified your intention of remitting us in full on the 14th instant in payment of the notes referred

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to, and accordingly have decided to deposit the money with you until April 1st, 1921, and trust that our action in so doing will assist you somewhat in the meantime.

"We have, therefore, computed the interest on the aforesaid notes to April 1st, next, and will ask that you kindly send us your cashier's check or certificate of deposit payable on the date last hereinabove stated in full and final settlement of the two notes enumerated herein."

In response to which the Castetter bank wrote:

"Herewith cashier's check \$1,323.30 payable April 1st, 1921, as per your phone of today to take up notes of Claude Hauschildt; you may indorse the notes over to us without recourse and send to us."

Receipt of the check was acknowledged "in settlement of the Claude Hauschildt notes, payment of which was assumed by yourselves," and the notes were indorsed without recourse, and, together with two chattel mortgages held as collateral security properly assigned, were delivered to Castetter bank, which held them at the time the receiver was appointed. The sum for which the cashier's check was given is made up of \$1,292.31, the principal sum due upon the notes, and \$30.99 interest thereon at 8 per cent. from December 14, 1920, to April 1, 1921.

The district court found that the cashier's check represented a loan and not a deposit, dismissed the application, but allowed the amount as a general claim. The correctness of this ruling is challenged by the applicant by appeal to this court.

The receiver of the Castetter bank presents two propositions to sustain the judgment: (1) That the cashier's check did not represent a deposit within the meaning of the depositors' guaranty act. (2) That, if the same was a deposit, it is not entitled to share in the guaranty fund because the Castetter bank agreed to pay interest thereon in excess of 5 per cent. per annum allowed by law.

First, was it a deposit? A depositor is "one who de-

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livers to or leaves with a bank money subject to his order. These may be either time deposits or open ones subject to check." *State v. Corning State Savings Bank*, 136 Ia. 79. This definition was approved in *Farrens v. Farmers State Bank*, 101 Neb. 285. The form the transaction takes, while important, is not controlling. *State v. Corning State Savings Bank*, *supra*. In that case claim was upon two certificates of deposit, but it was held that the true nature of the transaction could be inquired of to determine whether or not there had been a deposit, and it was decided that one of the certificates was a deposit and the other not.

In *Estate of Law*, 144 Pa. St. 499, it was said: "A deposit is where a sum of money is left with a banker for safe-keeping, subject to order, and payable, not in the specific money deposited, but in an equal sum. It may or may not bear interest, according to the agreement. Whilst the relation between the depositor and his banker is that of debtor or creditor simply, the transaction cannot in any proper sense be regarded as a loan, unless the money is left, not for safe-keeping, but for a fixed period, at interest, in which case the transaction assumes all the characteristics of a loan." But while the transaction may have these "characteristics of a loan," the same features are present in every case of a time certificate of deposit, and therefore do not determine the question.

It is suggested that the fund did not constitute a deposit because no money was deposited with the Castetter bank. We think the presence of the actual money is not a prerequisite to a deposit. If I discount a note at a bank and the proceeds thereof are placed to my credit, no actual money passes, but it could not be claimed that such proceeds were not a deposit. "Speaking generally, to create a deposit, within the meaning of the statute, money or the equivalent of money must in intention and effect be placed in or at the command of the bank, under circumstances which do not

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transgress specific limitations of the bank guaranty law." *Fourth Nat. Bank v. Bank Commissioner*, 110 Kan. 380, 390.

In the instant case the consideration for the cashier's check was the guaranty and assignment of the Hauschildt notes. Whether they were of any value does not appear with any certainty, but the Castetter bank must have considered they were good at the time they guaranteed their payment. The fact that the discounted note, or the notes in question, turned out to be uncollectable would not change the nature of the original transaction, in the absence of fraud, as the status of the cashier's check was fixed when issued. *Fourth Nat. Bank v. Bank Commissioner*, *supra*. Suppose, instead of guaranteeing payment of the notes, the Castetter bank in October, 1919, had purchased the notes and issued a certificate of deposit to applicant for the amount due thereon at the time. Can it be doubted but that the certificate represented a deposit within the protection of the guaranty law? The legal effect of the transaction would be the same if applicant had been credited in his drawing account—received a cashier's check which he deposited, or one payable at a future date which he held. In each case the assets of the Castetter bank were increased to the extent of the issued obligation; it held the notes as an investment in place of the credit to applicant.

How does the transaction in question differ in principle from the above? It is said that the cashier's check merely extinguished the obligation of the bank on its guaranty, and changed its form; but this ignores the fact that the bank received an equal amount in notes from which to reimburse itself. "When the primary purpose is not to establish the relation of debtor and creditor between bank and depositor, but to discharge some matured obligation of the bank by giving a time certificate of deposit, the certificate is no more than a bill payable." *Fourth Nat. Bank v. Bank Commis-*

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sioner, *supra*. If a bank owes \$1,000 rent and pays the same by a certificate at three months, there is no deposit but merely a change in the form of the obligation; but if the lessor holds liberty bonds in an equal amount as security for the rent, and as a part of the transaction surrenders them to the bank, the form of the obligation is alike changed, but, in addition, the certificate represents an equivalent of money, the title and control of which has passed to the bank, and therefore a deposit. It was held in *American State Bank v. Bank Commissioner*, 110 Kan. 520, that a deposit may be effected by giving a bank credit in another bank, subject to check or draft.

The parties here considered it a deposit. The applicant calls it such in his letter and asked for a cashier's check or certificate of deposit payable April 1, "in final settlement of the two notes," and the defunct bank sent the check in response. The effect is the same as if the amount had been credited to applicant's account and, instead of drawing it out, he had accepted a certificate or check payable April 1. The circumstance that he did so to accommodate the bank does not make it a loan any more than the ordinary time certificate. If a certificate at 4 per cent. is due, and depositor, at request of the bank, permits it to remain upon a certificate at 5 per cent., this would not change the deposit to a loan.

We think the true position is that, so long as the guaranty remained, it constituted a general claim against the Castetter bank, but when, by the cashier's check and transfer of the securities, the guaranty was fulfilled, the transaction constituted a deposit.

Second, is this a deposit within the protection of the guaranty fund? Considered as payment for the notes, the amount due January 15, 1921, was \$1,292.31 and 8 per cent. interest from December 14, 1920, or \$1,301.30. The cashier's check was for \$1,323.30, which amount was arrived at by calculating interest at 8 per cent. from

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January 15 to April 1, 1921. Section 306, Rev. St. 1913, reads as follows:

"No banking corporation transacting a banking business under this article shall pay interest on deposits directly or indirectly at a greater rate than five per cent. per annum. Any officer, director or employee of a bank violating the provisions of this section, directly or indirectly, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the state penitentiary not exceeding three years, or both."

Applying this section in *Iams v. Farmers State Bank*, 101 Neb. 778, we held that, where a certificate of deposit was issued at 5 per cent, but the bank agreed to pay, and paid, an additional 1 per cent. as a bonus, the transaction was a device intended to evade the provisions of the act, and did not possess that statutory characteristic of a deposit which provides for interest at only 5 per cent. per annum; and, further, that applicant was estopped from claiming protection, Dean, J., remarking: "The act creating the depositors' guaranty fund was intended by the legislature to be a shield of protection against loss to those who in good faith deposit their money in state banks in compliance with the terms of the statute. Unless its provisions are fairly construed and impartially enforced, this salutary law might become a destructive sword in the hands of unscrupulous persons having unlawful designs on the depositors' guaranty fund."

If applicant was a depositor, as we have held, then he became such on January 15, 1921, to the extent of \$1,301.30, on which he was lawfully entitled to contract for not more than 5 per cent. interest to April 1, 1921, \$13.50, or a total of \$1,314.80; but he demanded 8 per cent. and the bank issued its check for \$1,323.30.

How may we look upon this transaction otherwise than as a violation of the statute? If a certificate

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bad been issued bearing upon its face 8 per cent. interest, no clearer evasion of the statute would be shown. The language of the act, however, covers all cases where interest in excess of 5 per cent. is paid "directly or indirectly." In *American State Bank v. Bank Commissioner, supra*, it was held: "A certificate of deposit bearing a higher rate of interest than the maximum allowed by the bank commissioner is not within the protection of the guaranty fund. And the payment by the bank of a bonus to obtain a deposit bearing such maximum is equivalent to contracting for a higher rate." Applicant attempts to distinguish *Iams v. Farmers State Bank, supra*, on the ground that there the transaction was fraudulently conceived and was a clear defiance of the statute. We are not supplied with any direct evidence as to what was in the minds of the parties in the instant case, but the principle is well established that a party is presumed to intend the natural consequences of his act and the transaction on its face carries its condemnation. To calculate interest at the illegal rate and include it in the amount called for in the certificate is as much a fraudulent device as to make the certificate regular on its face with a side agreement for a bonus.

Morrison State Bank v. Michael, 54 Okla. 257, is cited to the proposition that the claim should be allowed with legal interest. That case is clearly distinguishable. A question of public policy, not a positive statute was involved; the action was by the depositor against the bank; no questions such as are here presented were under consideration. The claim here is for the protection of a statute which the claimant has plainly violated; to allow it would be to recognize a contract prohibited by positive law.

The judgment is

AFFIRMED.

Muffley v. Village of St. Edward.

ELVA J. MUFFLEY, APPELLANT, V. VILLAGE OF ST.
EDWARD, APPELLEE.

FILED JUNE 27, 1923. No. 22443.

Municipal Corporations: DAMAGES: NOTICE. The words, "arising from defective streets," in section 4384, Comp. St. 1922, have reference only to claims for damages to the person or property of travelers upon the street using the same in the ordinary way, and have no reference to a claim for damages to abutting property based upon negligence or tort of the city giving rise to a cause of action at common law; as to which claim no notice need be served before suit.

APPEAL from the district court for Boone county:
A. M. POST, JUDGE. *Reversed.*

Albert & Wagner and Williams & Williams, for appellant.

R. D. Flory, contra.

Heard before MORRISSEY, C. J., DAY and ALDRICH, JJ.,
COLBY and REDICK, District Judges.

REDICK, District Judge.

Action to recover damages for the flooding of plaintiff's premises caused by the insufficiency of ditches constructed by the village along the street to carry off the surface water collected therein from surrounding territory, and the failure of the village to remove the accumulated dirt and rubbish in such ditches causing the same to be choked up and to overflow upon plaintiff's premises. A demurrer to the petition was sustained by the lower court for the sole reason that it was not therein alleged that plaintiff had given the notice required by section 4384, Comp. St. 1922 (Laws 1915, p. 237), which provides:

"No city of the second class or village in the state of Nebraska shall be liable for damages arising from defective streets, alleys, sidewalks, public parks or other public places within such city or village, unless actual notice in writing of the accident or injury complained of with a statement of the nature and extent thereof, so far as the extent of the injury is known at the time, and

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of the time when and the place where the same occurred, shall be proved to have been given to the mayor or chairman of the city, or board of trustees or to the city or village clerk within 30 days after the occurrence of such accident or injury."

The only question for decision is whether or not the giving of the notice referred to in the statute is a condition precedent to the maintenance of the action, and we are therefore called upon to discover the intention of the legislature, which is made manifest by a consideration of the language used, in connection with the purpose sought to be accomplished, the subject of the act, the evil to be corrected and the remedy to be applied.

To facilitate the inquiry we reconstruct the section:

"No city shall be liable for damages arising from defective streets, unless actual notice in writing of the accident or injury complained of shall have been given to the city within 30 days after the occurrence of such accident or injury."

It will be perceived at once that notice is not required of *all* claims for damages, but only for such as arise from *defective streets*; so we must find that the damages claimed by plaintiff come within that class or the act is not applicable. It is first suggested that the ditch is not a part of the street. We do not deem it necessary to discuss this question, but assume that the ditch is a part of the street, though circumstances might arise in a particular case requiring a different holding, as where the traveled roadway is separated from the ditch by curbs or barriers.

What, then, is meant by a "defective street?" It is difficult, if not impossible, to use this adjective without associating with it the purpose for which the object it qualifies is intended. When we speak of a defective sewing machine, a defective water pipe, a defective rail, or anything else, the mind is at once directed to the use ordinarily made of the article, and thus an understanding and comprehension of the defect is established. When

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we speak of a "defective street," mental pictures instantly are presented of what might happen to the traveler as a result of the defect, the number and variety of them limited only by the power of the imagination; but in every such case it is the traveler who is considered because streets are built and kept in repair for travelers. True, roads are crowned and ditches or gutters are provided to take care of the surface water, but the primary purpose is to provide a way suitable for the traveler. Catch-basins are frequently placed at corners. If one of them should be broken or clogged up, it would be a defective catch-basin, not a defective street, because it has no relation to the use of the street. If the water washed out a part of the street and a traveler was thereby injured, the hole (defect) in the street would be the proximate cause, not the clogged catch-basin. If a pile of road material were left by the city in the street in such a position as to turn the surface water in a stream upon abutting property, and a traveler was injured by coming in contact therewith, doubtless his cause of action would be properly said to arise out of a defective street; but the damage to the abutting property would arise out of the improper use of his property by an adjoining proprietor, precisely the same as if he were a private person, and without the remotest relation to the fact that such premises constituted a highway, except for the purpose of identifying the culprit; the liability to the traveler is based upon a breach of the duty to keep the highway reasonably safe for travel, a duty owed only to travelers as such, while that to the abutter is founded upon the maxim, "*sic utere tuo ut alienum non laedas.*"

At common law a municipal corporation was not liable for failure to keep its streets in repair, but such liability was affirmed in this state as early as 1892 (*City of Omaha v. Jensen*, 35 Neb. 68; *City of Beatrice v. Reid*, 41 Neb. 214), and the statute under consideration, by reason of its position, in the charter of municipal corporations, and its specific reference to claims arising out

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of defective streets, would seem to have special and restrictive application to this newly declared liability peculiar to municipalities as such, rather than to obligations resting alike upon all persons and corporations.

We are of the opinion that the words, "defective streets," were used with reference to such conditions only as interfered with their use as such, and this conclusion is supported by the following cases: *Pye v. Mankato*, 38 Minn. 536; *Winchell v. Town of Camillus*, 109 App. Div. (N. Y.) 341; *Barber v. Town of New Scotland*, 88 Hun (N. Y.) 522 (all flooding cases); *Whitney v. Ticonderoga*, 127 N. Y. 40; *Hewison v. City of New Haven*, 34 Conn. 136; *Bliven v. City of Sioux City*, 85 Ia. 346; *Fugere v. Cook*, 27 R. I. 134. The only case coming to our notice militating against our construction is *Schleicher v. City of Mt. Vernon*, 107 App. Div. (N. Y.) 584, but it is clearly distinguishable because of the variant language of the statute. The case of *Willett v. City of Seattle*, 96 Wash. 632, cited by defendant, is not applicable because the statute reads, "All claims for damages against the city," and contains no reference to particular causes of damage. The cases of *Chaney v. Village of Riverton*, 104 Neb. 189, and *Nichols v. City of Minneapolis*, 30 Minn. 545, involved claims for injury to travelers or their property while using the highway. *Dovey v. City of Plattsburgh*, 52 Neb. 642, had under consideration a different statute specifying that notice must be given of all claims for negligence of the city, and not applicable to defendant.

The petition states a cause of action at common law and the district court erred in sustaining the demurrer.

REVERSED AND REMANDED.

ROBERT E. MOORE, PLAINTIFF, V. PATRICK E. MCKILLIP
ET AL., APPELLEES: LOUIS A. BERGE ET AL., APPELLANTS.

FILED JUNE 27, 1923. No. 22454.

1. **Specific Performance:** DEFENSES: INADEQUACY OF CONSIDERATION.
Inadequacy of consideration alone is no defense to specific per-

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formance of a contract, unless so great as of itself to furnish an irresistible inference of fraud.

2. ———: ———: ———. Inadequacy of consideration, although not sufficient of itself, accompanied by circumstances suggesting fraud or mistake inducing the assent of one of the parties, is an important factor upon the question of the specific enforcement of a contract.
3. ———: MISTAKE: REFUSAL OF RELIEF. It appearing that defendant signed the contract under mistake as to its subject-matter, and that to enforce the contract would be unjust and inequitable, a court of equity in the exercise of a sound judicial discretion may refuse specific performance, even though plaintiff was in no way connected with or responsible for defendant's mistake.

APPEAL from the district court for Lancaster county:
ELLIOTT J. CLEMENTS, JUDGE. *Affirmed.*

McCarty & Hager and P. N. Johnston, for appellants.
Albert & Wagner, contra.

Heard before LETTON, ROSE, DAY and ALDRICH, JJ..
REDICK, District Judge.

REDICK, District Judge.

This is an action in equity for the specific performance of a contract for the exchange of certain lots with an apartment house thereon, in the city of Lincoln, for 160 acres of land in Iowa. The case is presented upon a cross-petition by Louis A. and Josephine B. Berge, filed in an action to foreclose a mortgage upon the Lincoln property, in which Patrick E. McKillip and others are named as defendants. For convenience the parties will be referred to in this opinion as Berge, plaintiff, and McKillip, defendant.

The plaintiff alleges that on September 11, 1919, a written contract was entered into by the parties whereby plaintiff agreed to convey to defendant clear a certain 160 acres of land in Iowa, in exchange for the Lincoln property subject to a mortgage of \$6,000; that plaintiff delivered an abstract of the land to defendant, and on June 23, 1920, executed and delivered a deed of said lands to defendant, who retained and still retains the

same but refuses to convey the Lincoln property to plaintiff.

The defendant answered the cross-petition, admitting the execution of the contract, but averring "that he was thereunto induced by means of false and fraudulent representations made by the said cross-petitioners, their agents and others acting for them and in their interest," to the effect that the soil on the land so to be conveyed "was black sandy loam, productive and fit for cultivation and agricultural purposes; that 130 acres thereof was what is known as second-bottom land and the remainder first-bottom; that the Missouri river never flowed over, on or across any portion thereof and had never been nearer to said land than one and one-half miles; and was worth \$16,000;" that said representations were false, and "that within recent years * * * all of the said land, excepting about 55 acres, had been covered by the said river and had formed a part of the bed thereof, in consequence whereof all of the said land, excepting about 55 acres, is sand, totally unproductive and unfit for cultivation and agricultural purposes, and the whole of the said land is not, and never has been, worth to exceed \$2,000;" that the Lincoln property was worth \$24,000; that upon discovery of the facts defendant repudiated and rescinded said contract, and now offers to return the deed and do any other act required by the court. Defendant further alleges that he signed said contract under mistake of fact as to the location, character, quality and value of said land, as above detailed, all of which, except about 15 or 20 acres, consists of white sand and gravel, subject to overflow and unfit for cultivation.

The facts alleged in the answer were put in issue by a reply, in which it was further alleged that defendant by himself and his agents examined said land and were fully advised as to its nature, location, quality and value.

Findings of fact were filed by the trial court, which may be summarized as follows: (1) That the defense

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of false representations was not made out, finding for plaintiff on said issue of fraud: (2) that only about 60 to 65 acres of said land were tillable, the remainder being part of the old bed of the Missouri river and of little value; (3) that the value of the land did not exceed \$3,000, and of the Lincoln property, not less than \$7,000 above incumbrances; (4) that at the time of entering into said contract said McKillip understood and believed that said quarter section of Iowa land contained 130 acres of good, tillable land, and that only 30 acres thereof had ever been a part of the bed of the Missouri river, and that its value was equal to or greater than the value of the Lincoln property; (5) that said understanding, belief and mistake of said McKillip was induced and caused by the statements and representations of his agents, who examined the land and on whom he relied; (6) that if the land had been as understood by McKillip it would have been worth nearly as much as the Lincoln property; (7) that upon discovery of the truth said McKillip refused to proceed with the deal and so informed plaintiff by letter of November 24, 1919; (8) that June 23, 1920, plaintiff mailed to McKillip a deed to the land, which McKillip did not intend to and did not in fact accept, and tenders the same to plaintiff.

As conclusions of law the court found: (1) That plaintiff was not guilty of fraud or misrepresentation, and McKillip was not entitled to rescind: (2) that to decree specific performance is within the legal discretion of the court; (3) that, although a contract may be legal and enforceable at law, equity will not decree specific performance thereof unless it be just and fair in all its parts and not hard or unconscionable, nor unless it was entered into without misapprehension or mistake, where it would be unjust or unfair to require such performance; (4) a general finding for defendant.

Plaintiff appeals to this court, assigning a number of errors which need not be particularized.

It would extend this opinion to an unreasonable

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length to quote and analyze the evidence, so we must be content to state our conclusions therefrom with such references thereto as seem necessary to sustain such conclusions.

Louis A. Berge, husband of plaintiff, was a dealer and trader in lands and other real estate, and resident in Lincoln. Patrick E. McKillip was in the same business at Humphrey, Nebraska. R. C. Alderman was a real estate broker in Omaha, not connected with either of the parties, but making deals upon commission. F. G. Klope was in the employ of McKillip on a salary, engaged in looking up deals and inspecting properties to be dealt with.

The principals to the contract had no personal contact. The circumstances resulting in its execution were as follows. Alderman knew of Berge's ownership of the land through his connection with the deal by which Berge traded for it two tracts, one of 640 acres and the other 480 acres of land in northwestern Nebraska. He also knew of McKillip's Lincoln property from a list put out by McKillip. He suggested to Klope that a trade might be made, and they went to inspect the land late in August, 1919, and again early in September, when Klope, having reported to McKillip, on September 10 notified Alderman that the trade could be made. On September 11 Alderman first approached Berge on the subject, at Lincoln, and after an inspection of the apartments went to the office of Berge's attorney and had the contract prepared and signed by Berge; Alderman delivered it to Klope, who mailed it to McKillip, and he, after executing it, mailed a copy back to Klope.

Alderman represented no one but himself, his only interest being to secure a \$640 commission from McKillip. Upon the occasion of the visits to the land, it seems from his evidence Alderman was very careful not to make any representations as to its character or value. He says that, when asked by Klope how much of it was bench land, he answered: "I don't know; I never

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measured it; I know nothing about it, but here is your east line and there is your north line, you can tell from that." "I couldn't tell him there was 80 acres. It would have been guesswork if I had told him. I did not." Later on he testified all but 65 or 70 acres was in the old river bed. Klope says Alderman told him only about 15 or 20 acres were in the river bed, and he so estimated it. An unsuccessful effort was made to show that Klope was shown the wrong land; but however this may be, it appears that he was grossly mistaken as to a number of important facts concerning the land. For example, he thought there was a two-story house and small orchard on the southeast corner of the land, but this turned out to be on adjoining property, and his estimate of 15 or 20 acres of old river-bed land was quite out of line, as it is practically beyond dispute that not to exceed 65 acres were on the bench, and of this 10 or 15 acres were very sandy.

There can be little doubt but that Klope was materially deceived as to the vital questions concerning the land, not so much perhaps by any active misrepresentations of Alderman as by Alderman's refusal or failure to call attention to facts within his knowledge and by his own failure to exercise that degree of care and judgment, while inspecting the property, which his employer, McKillip, had a right to expect. To say the least, McKillip was extremely unfortunate in the selection of his agent. Klope reported his misinformation as to the land to McKillip, who signed the contract in reliance thereon. Had Alderman been the agent of Berge, there would be little difficulty in finding that the contract was procured by unfair means; but as Berge was not responsible for Alderman he cannot be held for Alderman's fault, and it was in this view of the matter, we take it, that the district court found against defendant on the issue of fraud.

Defendant realized the difficulty just referred to, and during the trial obtained leave to amend his an-

swer by setting up that McKillip entered into the contract under a mistake of fact, as hereinbefore set forth, and that it would be inequitable to enforce the same. The finding and decree of the lower court was for defendant on this issue.

Upon a careful study of the record, we are convinced that when he signed the contract McKillip understood and believed that only about 15 to 20 acres of the land had ever been a part of the old river bed. Kloke drew and gave McKillip a rough plat of the ground, which showed the then location of the Missouri river, also the old bank, by an irregular line across the western portion of the tract depicted as two eighties. While in fact one lay west of the other and they were in the usual oblong shape, the two eighties were shown one north of the other and in square form, instead of oblong, and plaintiff claims that the plat represented the eastern eighty and correctly shows the old bank, with the result that defendant must have known that all land west of the irregular line (about 100 acres) had been a part of the river bed. We think the claim untenable. The plat purports to cover two eighties, and the exterior boundaries are plainly drawn, and the line of the old river bank, inclosing about 20 acres, is shown near the west boundary of the tract as drawn. The natural thing to do was to draw the exterior boundaries of the tract, and then show any special features within the same. To sustain plaintiff's contention would require us to find that Kloke did a most unnatural thing—drew a plat of only one-half the land—and to extend the lines according to the plaintiff's theory, so as to show the entire tract, would place the west boundary less than one-half mile from the river, while the words on the plat and the other evidence fix it at about a mile and one-half. In addition to these considerations, Kloke testifies that the west line on the plat was intended by him to represent the west line of the tract.

The clear weight of the evidence sustained and re-

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quired the findings of fact of the district court. Defendant's mistake is not chargeable to plaintiff, nor to his own negligence, but to the failure of his agent to make adequate inspection of the land and report the actual conditions; such failure being at least partly due to his placing too much reliance upon Alderman.

Under these circumstances will a court of equity specifically enforce the contract, or should it exercise its discretion and refuse?

Inadequacy of price alone is not sufficient to prevent a decree, unless the disparity is so great as to shock the conscience of all reasonable men and thus afford an irresistible inference of fraud. Such a case was *Byers v. Surget*, 19 How. (U. S.) 303, where defendant attempted to sustain a public sale for \$9.75 of land worth from \$40,000 to \$70,000. That was an extreme case, but serves to illustrate the general rule, which arose partly from the difficulty of determining by any definite standard what amount of inadequacy must exist to constitute the exception.

The general rule is announced in the cases cited by plaintiff, *inter alia*, *Heyward v. Bradley*, 179 Fed. 325; *Boyce v. Holloway*, 45 Ind. App. 535; *Sweeney v. Brow*, 35 R. I. 227. In all of these cases, however, and in all coming to our attention, it is recognized that the rule is applicable only in the absence of fraud, oppression or mistake. Where inadequacy of price is shown, though insufficient in itself, if accompanied by circumstances fairly establishing fraud or mistake, a case is presented for the exercise of a sound judicial discretion by the court.

The circumstance that plaintiff was not in any way responsible for the mistake does not deprive the court of jurisdiction to grant relief on such ground in this class of cases. In *Kerr on Fraud and Mistake*, p. 411, the doctrine is stated: "A court of equity will, however, in many cases refuse to grant a plaintiff the peculiar remedy of specific performance of a contract, which the defendant has entered into under a mistake, al-

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though plaintiff was not privy to the mistake, nor implicated in its origin. A man who seeks to take advantage of the plain mistake of another cannot come to a court of equity to assist him in doing so, but must rest satisfied with the remedies which a court of law will give him." And 2 Pomeroy, Equity Jurisprudence (3d ed.) sec. 860: "A mistake which is entirely the defendant's own, or that of his agent, and for which the plaintiff is not directly nor indirectly responsible, may be proved in defense, and may defeat specific performance. This is indeed the very essence of the equitable theory concerning the nature and effect of mistake." See, also, *Somerville v. Coppage*, 101 Md. 519; *Kelley v. York Cliffs Improvement Co.*, 94 Me. 374; *Cawley v. Jean*, 189 Mass. 220; *Clitherall v. Ogilvie*, 1 Desaus. Eq. (S. Car.) 250.

The case principally relied upon by plaintiff is *Heyward v. Bradley*, *supra*. The case is illustrative of the tenacity with which the rule of mere inadequacy of consideration is adhered to. The subject of the contract was lands supposed to contain deposits of phosphate rock, but the existence of which could only be determined by prospecting involving considerable expense. The option was negotiated between two lawyers (one the husband of defendant), with the expectation that plaintiff would explore the lands at his own expense, and if paying deposits were found the option would be taken up, otherwise not. The defendant was perfectly familiar with the land. The only unknown feature was the phosphate content, the possibility of which gave it a value far beyond what it would otherwise have; in fact, only the mineral content was covered by the option. By the plaintiff's expenditure of over \$2,500 it was manifested that there were phosphate deposits to the extent of 280,000 tons, which, when mined, would have brought defendant \$70,000 in royalties, whereas she received but \$20,000. At page 328 it is said: "Neither at the time the money was paid nor at any other time prior to the commencement of this suit, so far as appears from the rec-

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ord, was there any contention that there had been any mistake." And the court stated the question to be (p. 329): "Shall the plaintiffs be deprived of the benefits of a contract, fair and unobjectionable at the time it was made, because it has turned out that as a result of their enterprise and expenditure a much larger quantity of rock has been discovered on the land than the defendant believed to be there at the time the contract was made?" There were no circumstances or appearances calculated to mislead defendant or create in her mind a mistaken belief as to the fact; the parties were dealing with an unknown quantity, with equal opportunity to form an opinion; the conditions were known, and the only mistake, if any, under which defendant labored was one of judgment, rather than of fact. The case is naked of any material with which to decently clothe the discretion of the chancellor, and so, with becoming modesty, he allowed it to remain in the privacy and seclusion of his unawakened conscience.

The instant case presents many different features. It is beyond question defendant was mistaken as to the quality of the land (his counsel refuses to classify it under this term, insisting that "*sand* is not *land*"). It was traded at \$16,000, while its value at the highest estimate of real estate men was fixed at \$3,000. Plaintiff offered no evidence except his own on this point, fixing it at \$100 an acre. The evidence is conclusive that not over 60 acres were tillable, and the remainder practically valueless. On the other hand, defendant's property, at the lowest estimate of a loan man, was worth \$13,000. The sum of \$6,000 was borrowed upon it, which on the basis of 40 per cent, would indicate a value of \$15,000. It produced an income of \$135 to \$185 a month, warranting a still higher estimate; and it was located across the street from the courthouse. Plaintiff had himself seen defendant's property, while defendant had not personally inspected that of plaintiff. Plaintiff, who is presumed to have known the quality of his own property, places

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upon it a price of \$16,000, which was more than five times its value. He was evidently unable to secure disinterested witnesses to place its value at his own figure. He accepts the services of Alderman without inquiry as to the means by which the contract was secured, was notified six months before any effort was made to close the deal, by exchanging deeds, that defendant claimed to have signed the contract under mistake and refused to go on; and now comes to a court of conscience asking it to assist him by compelling defendant to convey property of a clear value of \$7,000 to \$8,000 for \$3,000. Can such a contract be truthfully characterized as "just and fair in all its parts," or fair and unobjectionable at the time it was made? We think not. "However strong, clear and emphatic the language of the contract, however plain the right at law; if a specific performance would, for any reason, cause a result, harsh, inequitable or contrary to good conscience, the court should refuse such a decree and leave the parties to the remedies at law. In an equity proceeding, the complainant must do equity and can obtain only equity." *Kelley v. York Cliffs Improvement Co., supra.*

In *Griffin v. Nash*, 187 Ia. 345, it was said: "Specific performance of a contract is seldom a matter of right, and should not be granted in aid of a party seeking to enforce an unjust or an inequitable contract"—citing *Smith v. Shepherd*, 36 Ia. 253; *Auter v. Miller*, 18 Ia. 405.

This language is applicable to the case at bar; the decree of the lower court is right, and is

AFFIRMED.

EMIL R. TUTSCH, APPELLEE, V. OMAHA STRUCTURAL STEEL
WORKS, APPELLANT.

FILED JUNE 27, 1923. No. 22464.

Negligence: QUESTION FOR JURY. Under the facts detailed in the opinion, the questions of negligence and contributory negligence were for the jury.

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APPEAL from the district court for Douglas county:
CHARLES LESLIE, JUDGE. *Affirmed.*

Switzler, Ringer, Switzler & Shackelford, for appellant.
Joseph T. Votava, contra.

Heard before LETTON, ROSE, DAY and ALDRICH, JJ.,
REDICK, District Judge.

REDICK, District Judge.

This is an action to recover damages to plaintiff's automobile, claimed to have been caused by negligence of defendant. Plaintiff alleges that, as he was driving west on the Lincoln Highway about 6:30 a. m., December 15, 1915, he was suddenly confronted with a ditch about ten feet wide across the road; that he was traveling at a moderate speed, and upon discovery of the ditch applied his brakes and turned the car to the left to avoid the ditch, and ran into and upon a pile of dirt on the south side of the road, thereby upsetting his car and damaging it in the sum of \$679.60. Plaintiff further alleges that there were no lights or barriers to warn travelers of the existence of the ditch. Defendant answered with a general denial, and allegation of contributory negligence, which was denied by a reply. Verdict and judgment for plaintiff for \$437.50 and interest, and defendant appeals.

The evidence fairly establishes these facts: Defendant was the contractor of the county constructing a bridge at the place in question. He dug a trench across the road for the purpose of putting in a concrete abutment, which had been placed, but the ditch, about ten feet wide and nine feet deep, had not been filled, the wooden forms not having been removed. In digging the trench the dirt had been thrown up to the south side of the traveled way and encroached thereon to an extent varying from a few inches to nearly half way across; the witnesses differing. The dirt pile extended lengthwise of the road about fifteen feet, and was four or five feet high and sloping down. The abutment was at the east end of the bridge and the ditch

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east of the abutment. Around the bridge a temporary road had been provided connecting with the highway a short space east of the pile of dirt. The morning in question was very dark and a slight covering of snow was on the ground. A red lantern was hung upon a post near the east end of the pile of dirt and was burning as late as 3:20 a. m., but was not there at 6:30, and later was found in the ditch. There was no barricade across the road east of the ditch, but a plank had been laid across the bridge resting upon the ground at an angle of 45 degrees toward the west. Plaintiff approached the bridge driving a Jackson car at the rate of 8 to 12 miles an hour, brakes in good order, and presto-lights which illumined the road for 25 to 30 feet ahead. The car could be stopped in ten feet. He saw the ditch when about 15 to 20 feet from it, had observed the plank just previously, and took it to be the floor of the bridge about a foot higher than the roadway. Upon observing the ditch, and not having seen the pile of dirt, he immediately put on his brake and turned to the left to avoid running into the ditch, and the car upset, throwing the occupants to the ground, but without injury to them.

Defendant assigns error in the overruling of his motion for a directed verdict at close of plaintiff's evidence and at close of all the evidence on grounds (1) that no negligence of defendant was proved, (2) that plaintiff was guilty of more than slight contributory negligence.

As to the first point, we think the evidence sufficient to present a question for the jury whether defendant was negligent in not placing a barricade across the road east of the ditch. One witness testified to such barricade, but he was clearly mistaken. It is a debatable question whether a red light placed at the side of the road on the pile of dirt was a sufficient warning of the impassability of the road itself. It was a warning to keep to the right of the light, but had no tendency to give notice of defects beyond. A red light upon an obstruction at the side of

a road gives notice not to come there, but impliedly invites the traveler to proceed, having observed the caution. This is a very common experience which must be reckoned with by those called upon to exercise ordinary care in such situations. Plaintiff would have passed the pile of dirt safely had it not been for the ditch.

On the second point defendant contends that, inasmuch as plaintiff testified that he could stop his car in ten feet, and that he observed the ditch at 15 or 20 feet, as a matter of law he was guilty of more than slight negligence. The conclusion is not inevitable; it is unsafe to draw a final conclusion from two isolated facts. In determining whether or not plaintiff acted as a reasonably prudent man, there must be considered the surrounding conditions, such as the darkness of the morning, the uncertainties of artificial light, the suddenness with which the danger confronted him, the quality of the danger, the absence of the red light which might have better prepared him to meet the danger, etc. While defendant might not be responsible for the absence of the light, it was a circumstance to be noticed in measuring plaintiff's conduct.

It may be true that if plaintiff had not turned he could have stopped short of the ditch, but the question remains whether, being placed in the position by defendant's negligence, he exercised ordinary care in the emergency. If he did, defendant is liable, though it may appear that by pursuing a different course he would have escaped. With these considerations in mind, even if the red light had been there, we think it would be a fair question for the jury whether it was so placed as to give sufficient warning of the real danger ahead, and notwithstanding plaintiff testified on cross-examination that the light would have been a suitable warning for him to watch himself and he would not have run so close to the ditch. It would hardly be fair to hold plaintiff irrevocably to an opinion based upon a suppositious case.

We are asked to apply a hard and fast rule that, where a driver of an automobile is going at such a rate of speed

that he cannot stop within the distance that he can plainly see obstructions ahead of him, he is not using ordinary care, as approved in *Lauson v. Fon du Lac*, 141 Wis. 57; *Scott v. O'Leary*, 157 Ia. 222; *West Construction Co. v. White*, 130 Tenn. 520; *Solomon v. Duncan*, 194 Mo. App. 517; *Ebling v. Nielsen*, 109 Wash. 355; and *Knoxville R. & Light Co. v. Vangilder*, 132 Tenn. 487. All but two of those cases involved obstructions in plain sight upon the side of the road, and involved other considerations, such as excessive speed, inattention, etc. They follow the Wisconsin case, in which plaintiff had only one light tilted down and his car ran through and knocked down barriers across the road 24 feet from the ditch. The Iowa case was a head-on collision with a horse and buggy on the proper side of the road, and involved excessive speed and inattention. Those cases are clearly distinguishable. A driver may expect to find obstructions at the side of the road, but can hardly be called upon to anticipate an unguarded ditch across it. In the former cases the danger may generally be avoided by turning out, as was stated. The asserted analogy is imperfect.

Error is assigned for refusal of the court to give instruction asked by defendant to the effect that, if defendant placed the light using ordinary care, its duty was fulfilled, and it would not be liable for its removal without notice. This was sufficiently covered by instruction No. 4 given by the court, after stating the duty resting upon defendant, in these words: "On the contrary however, if you find by a preponderance of the evidence that the defendant had taken such precautions to warn the plaintiff and others attempting to use the roadway at the point in question of the danger of so doing, then the plaintiff cannot recover and your verdict should be for the defendant."

Error is assigned for refusal of the court to give request No. 4 of defendant, but as the only objections urged thereon relate to the alleged error in overruling defendant's motion for a directed verdict for want of proof

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of negligence of defendant, and for more than slight negligence of plaintiff, and these questions having been disposed of, we do not deem it necessary to further consider this assignment.

Finding no error in the record, the judgment is

AFFIRMED.

J. P. HESS, TRUSTEE, PLAINTIFF, v. GEORGE C. ESELIN ET AL., APPELLEES: JACOB L. KALEY, APPELLANT.

FILED JUNE 27, 1923. No. 23308.

1. **Homestead: CONVEYANCE.** The homestead interest of a judgment debtor may be conveyed or incumbered to the full extent of \$2,000, and the vendee will take the title free of the judgment.
2. ———: **EXTINGUISHMENT.** Where there is a mortgage for \$5,000 upon realty subject to a homestead interest, and the owner executes a second mortgage thereon for \$2,000, reciting that, "The purpose of this mortgage is to mortgage * * * all of his homestead rights," the homestead is thereby extinguished as against an intervening judgment lien, which attaches to any excess in value above the two mortgages.
3. ———: ———: **SALE UNDER EXECUTION.** The homestead interest having been extinguished, the sheriff was not required to take notice of a written claim of homestead, and a sale of the property on execution upon the judgment was valid, and the sheriff's deed in pursuance thereof passed all title and interest of the claimant to the purchaser.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.*

J. L. Kaley and John M. Macfarland, for appellant.

Charles W. Haller, contra.

Heard before MORRISSEY, C. J., DAY and ALDRICH, JJ.,
COLBY and REDICK, District Judges.

REDICK, District Judge.

This action was brought by J. P. Hess, trustee, for the purpose of foreclosing a mortgage upon certain real estate, but the questions arising on this appeal are between two defendants, George C. Eselin and Jacob L. Kaley, as to whether or not the property in question, to

the extent provided by statute, constituted a homestead of Eselin, and therefore not subject to the lien of Kaley's judgment against him. For the purposes of convenience Eselin will be referred to as plaintiff and Kaley as defendant. The facts are practically undisputed and may be summarized as follows:

March 1, 1918, Eselin acquired the property in controversy, consisting of less than two city lots, by means of a contract of purchase, and moved into the premises with his family, consisting of a number of minor children, and has ever since occupied the same. There is a single building upon the premises, but consisting of four apartments, in one of which Eselin and his family reside. The entire building is supplied with only one water system and a central heating plant, and the property is worth about \$8,000, less incumbrances. There is no evidence tending to show that it is feasible or practicable to separate the apartment occupied by Eselin and set it off as a homestead, and no effort has been made in that direction. July 30, 1919, Eselin married Emma Morgan, who on June 6, 1921, obtained a divorce from him, which did not become operative under the statute for a period of six months thereafter. The decree was filed June 10, 1921.

Prior to the October, 1919, term, Kaley sued Eselin in the district court for Douglas county on a \$10,000 note, and at said term, and on January 9, 1920, recovered a judgment for \$11,284.42. Eselin appealed to the supreme court without a supersedeas and the judgment was affirmed June 8, 1921. In the fall of 1920, pending appeal, in garnishment proceedings on the judgment, Eselin filed his claim for personal exemptions, stating therein, as required by law, that he owned no homestead, and the court allowed the personalty exemptions, the sum of \$400 impounded being awarded claimant.

December 29, 1919, Eselin entered into a written contract of exchange with one Vizzard by which he agreed to convey the real estate in question to Vizzard, and

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Vizzard agreed to convey to Eselin another piece of real estate in the city of Omaha. January 9, 1920, Eselin and wife executed and delivered to Vizzard their deed, which was recorded, it being understood between the parties that Eselin should remain in possession until Vizzard's deed to him was executed and delivered. In the meantime Vizzard took charge of the Eselin property, collected the rents and paid the expenses, but collected no rent from Eselin, but never executed a conveyance to Eselin, for the reason that the Kaley judgment rendered the same day but a little later than the delivery of Eselin's deed to Vizzard, by reason of the lien thereof relating to the first day of October term, constituted an apparent cloud upon Eselin's title and would so continue until the appeal was determined. The execution of the contract of exchange remained in abeyance under the conditions above stated until June 8, 1921, the date of the affirmance of the judgment, and on that date Vizzard rescinded the agreement, rendered a full accounting, and reconveyed to Eselin the property in controversy. On the same day Eselin executed and delivered a mortgage upon the property to the First National Bank for \$2,000, reciting that he was a single man, and that "the purpose of this mortgage is to mortgage * * * all of his homestead rights and other rights in said premises."

Execution upon Kaley's judgment having been levied upon the property, upon June 6, 1921, Eselin served notice in writing upon the sheriff that he claimed the property as his homestead, but the sheriff disregarded the notice and sold the property to Kaley for \$1,000. Eselin filed objections to the confirmation of the sale on the ground that the property was his homestead, and, the objections being overruled, appealed to this court, where the judgment confirming the sale was affirmed for the reason that the question of homestead could not be litigated upon the motion to confirm the sale, but holding that, notwithstanding such sale, Eselin had the right in a proper proceeding to litigate the homestead question,

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which he seeks to do in this proceeding by way of answer to the cross-petition of Kaley filed in the foreclosure case. The district court entered a decree foreclosing the plaintiff's mortgage and a mortgage in favor of the First National Bank of Omaha, finding that Eselin was entitled to a homestead interest to the amount of \$2,000 as against the Kaley judgment, but that, subject to the mortgages and said \$2,000 homestead interest, the sheriff's deed to Kaley was valid, and Kaley appeals to this court. Eselin filed a request for stay, which Kaley moved to strike, and Kaley also appeals from the order overruling said motion.

It will therefore be noted that a single question is presented for determination, namely, whether or not Eselin is entitled to a homestead exemption in the property described as against the Kaley judgment, as in view of the conclusion we have reached it will not be necessary to consider the error assigned relating to the overruling of the motion to strike the request for a stay.

The moment Eselin entered into a contract for the purchase of the premises and took possession of a portion thereof and occupied it as a homestead for himself and family, the premises became impressed with a homestead interest to the extent of \$2,000 of its value over and above incumbrances, and this interest subsists and will be protected unless the homestead has been conveyed in the manner required by statute or intentionally abandoned as such by the plaintiff.

It is first suggested that, by the contract with Vizzard and the conveyance to Vizzard by Eselin and wife, the homestead interest was extinguished. No doubt if that contract had been carried out the result would have been as claimed, and other necessary conditions being present the homestead interest would attach to the property received in exchange. This would not help Kaley, however, because, if Eselin had a homestead interest, he had a right to sell it to Vizzard free of defendant's judgment,

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and within six months thereafter reinvest it in another homestead which would not be subject to sale under the judgment. Comp. St. 1922, sec. 2828. Until he acquired another homestead he was entitled to the existing one, never having completely abandoned it by giving up possession.

However, we think the transaction between Eselin and Vizzard must be looked upon as an unsuccessful and uncompleted attempt to transfer the homestead right, and that Eselin, never having given up possession, always retained a sufficient interest to support the claim of homestead, and that the reconveyance by Vizzard simply restored the situation as it was before the contract. In this view of the matter it is immaterial whether the attempt at a conveyance was before or after the incipency of any lien arising from the judgment.

It is also contended that by the mortgage to the First National Bank, placed expressly upon the homestead interest and being executed subsequent to the judgment, such interest was extinguished and the judgment lien let in.

In December, 1919, Eselin, on his personal note, borrowed from the First National Bank \$2,800 for the purpose of paying the remainder of the purchase price and obtaining a deed of the property in question, and the money was so applied; the loan was reduced by \$800 through payments made by Vizzard on Eselin's account from the surplus revenue derived from rentals of the apartments, and when the Vizzard contract was rescinded and an accounting had, the mortgage for \$2,000 was given as security for the balance due on the loan. It was dated June 8, two days after the decree of divorce was pronounced and two days before it was journalized, and this accounts for the recital that Eselin was a single man, though in law and in fact the decree was not effectual to sever the marriage tie until six months later, and Eselin attempted to defeat it on the ground that he was still married and the instrument, being upon the home-

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stead and not signed by the wife, was void; but the lower court held the mortgage valid and that question is not presented by this appeal. The mortgage recited that it was upon the homestead interest, but the effect would have been no different if it had merely been for a loan without such recital; in either case it operated, as against the judgment lien, to secure to Eselin his full homestead exemption of \$2,000. The property was sold under the Kaley judgment June 14, 1921, after the mortgage to the bank. The real question, therefore, to be decided is whether or not the sheriff's sale was void, and this depends upon whether or not Eselin had a homestead interest at the time. We held in *Kaley v. Eselin*, 108 Neb. 544:

"When an execution debtor has a valid right of homestead in real estate levied on and gives the sheriff, holding the execution, the statutory notice of his claim of homestead therein, a subsequent sale of said property without compliance with the provisions of chapter 29, Rev. St. 1913, is void; but, as the statute provides no method of determining the validity of such claim of homestead, when the same is disputed, the question should be determined in a proper action upon issues regularly joined, and unless and until such disputed right is so determined such sale will not be held to be invalid."

Let us see, then, how the matter stands. Prior to the giving of the mortgage to the bank, Kaley's judgment was a lien upon any excess of value in the property over and above the \$5,000 mortgage and the \$2,000 homestead exemption, and if the sale had been made prior to the giving of the mortgage we would be compelled to hold it void, because, as we have seen, notwithstanding the Vizzard transaction, Eselin had a homestead interest in the property to the extent of \$2,000. This interest he might sell or mortgage and Kaley would have no cause to complain; but he would have no right to increase liens upon the property, after the lien of the judgment attached,

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beyond what they were at that time, plus the homestead interest. But what was his position after having given the mortgage for \$2,000? He had loaded the property to the full extent he might lawfully do as against the Kaley judgment. He had, by the mortgage, in effect conveyed his homestead right in the premises to the bank and had nothing left as against the judgment. The mortgage to the bank may have been void, not having been signed by the wife, but the decree found it a valid lien, and as no error is assigned in this respect the finding of the validity of the mortgage has become the law of the case and cannot be disturbed. But Kaley is not thereby placed in any worse position, because his lien was only upon the excess over and above the mortgage and homestead exemption; in fact, his position is improved because, the mortgage having extinguished the homestead right, the sheriff's sale under which he claims escapes being held void.

We are of the opinion that at the time of the sheriff's sale, Eselin had no homestead right in the property, and that thereby Kaley has succeeded to all the right and title of Eselin therein. The effect of the decree is to preserve and secure to Eselin all the protection to which he is entitled under the homestead laws. The judgment creditor is in the same position he would have been in had the mortgage not been given, except the point as to the validity of the sale; the mortgage simply taking the place of the homestead interest. The writer is not clear whether it is contended that Eselin is entitled to a homestead interest over and beyond the bank's mortgage, but such contention would be clearly untenable, for the reason that it would increase the liens upon and interests in the property prior to the judgment to the sum of \$9,000 and thus put the creditor, after his lien had attached, by the act of the debtor alone, in a worse position than he occupied before the giving of the mortgage. *Beach v. Reed*, 55 Neb. 605.

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Notwithstanding some diversity of opinion between this and the district court as to some of the legal questions involved, we think the result reached by the decree of the lower court is correct and it should be affirmed.

AFFIRMED.

SIoux CITY BRIDGE COMPANY, APPELLANT, v. DAKOTA
COUNTY, APPELLEE.

FILED JULY 9, 1923. No. 21252.

1. **Decisions Overruled.** Following the decision of the supreme court of the United States in *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, principles of law announced in the third paragraph of the syllabus of this same case in 105 Neb. 843, and in *Lincoln Telephone & Telegraph Co. v. Johnson County*, 102 Neb. 254, are overruled.
2. **Appeal: ERRONEOUS THEORY OF LAW.** Where it appears that in the district court an equity case was tried on the wrong theory of the law, this court, in the exercise of its discretion and in the interest of justice, may remand the case with permission to introduce further evidence based upon the proper theory of the law.

APPEAL from the district court for Dakota county:
GUY T. GRAVES, JUDGE. *Remanded for new trial.*

Jesse L. Root and Wymer Dressler, for appellant.

George W. Leamer and Gaines, Van Orsdel & Gaines,
contra.

Heard before LETTON, ROSE, ALDRICH, and DAY, JJ.,
REDICK, District Judge.

PER CURIAM.

The assessor of Dakota county, for the year 1918, fixed the actual value of the Sioux City Bridge Company's bridge, or that part of it assessable in Nebraska, at \$600,000. On appeal by the bridge company to the board of equalization, on complaint that the assessment was excessive, the value was increased to \$700,000. Thereupon the bridge company took an appeal to the district court, where

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upon a trial a judgment was entered affirming the findings of the board of equalization. On appeal by the bridge company to this court, the judgment of the district court was affirmed, our opinion being found in 105 Neb. 843, where the facts upon which the opinion is based are fully set forth. Upon the trial in the district court, as well as on the appeal in this court, two main grounds were presented by the bridge company for a substantial reduction of the value of its property as found by the assessor: First, that the valuation placed upon the bridge company's property was excessive; and, second, that the valuation placed on the property was inequitable and not in proportion to the value placed upon other property in the district; that the value of the bridge property was fixed at more than 100 per cent. of its true value, while the value of other property in the district was fixed at 55 per cent. of its true value; that by so doing the bridge company has been deprived of due process and equal protection of the law as forbidden by the Fourteenth amendment to the Constitution of the United States. In our former opinion we reviewed the facts bearing upon the question of the value of the bridge, and came to the conclusion that the findings of the board of equalization on that issue were not so manifestly wrong as to warrant the court in disturbing them. With reference to the objection that the other property in the district was undervalued, which resulted in an unlawful discrimination against the bridge company, we said:

"It is finally urged that this court should reduce the true value of the bridge as found by the court to 55 per cent. of such value, for the reason that other property in the district is assessed at 55 per cent. of its true value, and that it would be manifestly unjust to appellant to assess its property at its true value while other property in the district is assessed at 55 per cent. of its value. While undoubtedly the law contemplates that there should be equality in taxation, we are of the view that the

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plan of equalization proposed by appellant is not the proper remedy. The rule is now settled by a recent decision of this court that when property is assessed at its true value, and other property in the district is assessed below its true value, the proper remedy is to have the property assessed below its true value raised, rather than to have property assessed at its true value reduced. *Lincoln Telephone & Telegraph Company v. Johnson County*, 102 Neb. 254. In the argument of appellant the soundness of this ruling is assailed, and authorities in other jurisdictions are cited which seem at variance with our holding. We are not willing, however, to recede from the rule of that case."

The case was then taken on a writ of certiorari to the supreme court of the United States, where our judgment is reviewed. *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441. The opinion in that case is apparently satisfied with our conclusions on the question of the value of the bridge company's property.

In discussing the question raised by the bridge company that there had been an unlawful and intentional discrimination against it, by an undervaluation of other property in the district, the United States supreme court, after quoting from our opinion the matter above quoted, and citing authorities, said:

"The charge made by the bridge company in this case was that the state, through its duly constituted agents, to wit, the county assessor and the county board of equalization, improperly executed the Constitution and taxing laws of the state, and intentionally and arbitrarily assessed the bridge company's property at 100 per cent. of its true value, and all the other real estate and its improvements in the county at 55 per cent.

"The supreme court does not make it clear whether it thinks the discrimination charged was proved or not, but, assuming the discrimination, it holds that the bridge company has no remedy except 'to have the property as-

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essed below its true value raised, rather than to have property assessed at its true value reduced.' The dilemma presented by a case where one or a few of a class of taxpayers are assessed at 100 per cent. of the value of their property, in accord with a constitutional or statutory requirement, and the rest of the class are intentionally assessed at a much lower percentage, in violation of the law, has been often dealt with by courts, and there has been a conflict of view as to what should be done."

The supreme court then say: "This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirement of statute."

That court then say: "But we construe the action of the court (Nebraska supreme court) not to be equivalent to a finding that such intentional discrimination existed between the valuation of the bridge company's property and that of all other real property and improvements in the county, but rather a ruling that, even if it did exist, the bridge company must continue to pay taxes on a full 100 per cent. valuation of its property."

The United States supreme court has correctly interpreted our decision. Our theory was that the bridge company should have made complaint before the board of equalization of the inequality of valuation between its property and other property in the district, and asked that other property be raised. It was on this same principle, no doubt, that the district court failed to pass upon the issue of discrimination.

The supreme court then say: "It is therefore just that, upon reversal, we should remand the case for a further hearing upon the issue of discrimination, inviting attention to the well-established rule in the decisions of this court, cited above, that mere errors of judgment do not support a claim of discrimination, but that there must be something more, something which, in effect, amounts to

an intentional violation of the essential principle of practical uniformity."

We have been asked by both sides to pass upon the issue of discrimination on the record before us.

It was evidently the theory of the trial court that testimony on the issue of discrimination was immaterial under our former ruling in *Lincoln Telephone & Telegraph Co. v. Johnson County*, 102 Neb. 254. The bridge company undertook to establish its claim of undervaluation of other property by introducing testimony based upon an examination of the deed record in Dakota county. The consideration named in certain deeds was taken as indicative of the value of the real estate. The assessed value of the same property was then taken, and from a large number of such comparisons a percentage was worked out which indicated to the mind of the witness that the real estate in the county was assessed at 55.70 per cent. of its value. The witness admitted that in making his calculations he did not take into consideration all of the deeds, but only those which in his judgment presented a reasonable proportion between the consideration named and the assessed value. While this method, no doubt, is entitled to probative force, it is manifest that it is not conclusive and is subject to many imperfections. It is a matter of common knowledge that many sales are based on trades in which the consideration is inflated. The true test in all cases is to arrive at the fair value of the property.

On the issue of discrimination in the district court, the defendant obviously relied on the doctrine previously announced by this court in *Lincoln Telephone & Telegraph Co. v. Johnson County*, 102 Neb. 254, to the effect that the relief sought by the bridge company required the raising of the value of other property, rather than the reduction of the value of the bridge company's property. The trial court evidently so held, and in that view of the law the defendant in meeting the issue did not go extensively into proof of the value of specific property upon

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which the bridge company relied to form the basis of its calculations tending to show discrimination.

Under the different rule announced by the supreme court of the United States, it seems just that the defendant county and the taxpayers generally should have an opportunity to offer further testimony.

While it might be inconvenient, it is not impossible to prove the value of any particular piece of property by calling witnesses who are competent to testify on that question. The assessor did testify that it was his aim and purpose to place fair value upon all of the property. With reference to a few instances named by the witness for the bridge company where the assessment was about one-half of the consideration named in the deed, the assessor gave good reason for the apparent discrepancy, stating in one instance that the land had been washed away by the river.

Without going into detail, we have concluded that, in the interest of justice, the case should be remanded to the district court for a retrial upon the issue of discrimination.

REMANDED FOR FURTHER PROCEEDINGS.

ALEXANDER M. HUGO, APPELLANT, V. WILLIAM M.
ERICKSON, APPELLEE.

FILED JULY 9, 1923. No. 22391.

Vendor and Purchaser: CONTRACT: REFORMATION. Where the owner of a city lot, on which is situated a house designated in the business directories of the city under a certain number, exhibits the property to a prospective purchaser in such a way as to leave in the mind of the latter the firm conviction that the entire lot is offered to him to purchase, and the parties enter into a memorandum agreement wherein the property is designated by the number it bears in the directories, and a payment is made on the purchase price by the purchaser and accepted by the seller, a court of equity will reform a more formal contract subsequently signed by the parties wherein only a portion of the lot is covered by the contract, when it appears that the purchaser signed the formal contract believing that it covered the entire tract shown him by the seller, and that he

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would not have entered into the contract except for the deception practiced by the seller.

APPEAL from the district court for Douglas county:
CHARLES A. GOSS, JUDGE. *Reversed, with directions.*

Bigelow, Peterson & La Violette, for appellant.

Will H. Thompson and L. R. Slonecker, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN and DAY,
JJ., BUTTON, District Judge.

MORRISSEY, C. J.

This is an action in equity to reform a contract. From a decree denying the relief prayed, plaintiff has appealed.

Defendant was the owner of two adjoining lots, numbered 21 and 22, each 50 feet wide and 130 feet long, in the city of Omaha. Lot 21, which is involved in this suit, was known as 4005 Charles street, and lot 22 was known as 4001 Charles street. Lot 21 had a frontage of 50 feet on Charles street, and lot 22 had a frontage of 50 feet on Charles street and 130 feet on Lowe avenue. The lots fronted the north. An alley extended the full length of the block running from east to west and the lots extended from Charles street to the alley. There was a house on each lot.

May 17, 1920, defendant listed for sale with a real estate firm the property designated as 4005 Charles street, at the price of \$4,500. On the "listing form" the dimensions of the lot were given as 50 feet by 90 feet. The lot is also shown to abut upon an alley. Much other detail was set out which is not of consequence here. The property was immediately advertised for sale by the real estate firm.

Plaintiff was on intimate terms with a family named Crozier, and a tentative agreement had been reached between plaintiff and Mr. and Mrs. Crozier that plaintiff should purchase a residence, Mr. and Mrs. Crozier occupy it, and plaintiff makes his home with them. Mrs. Crozier telephoned to the real estate firm for information in regard to the property. She was advised to call upon

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defendant, who lived at 4001 Charles street, and was assured that he would show the property. Following this direction plaintiff, together with Mr. and Mrs. Crozier, went to defendant's home, where they found him eating his evening meal. He directed them to go to the house at 4005 Charles street, saying that the tenant would permit its inspection. They immediately did as directed. When their inspection of the interior of the house was completed they were joined by defendant, who accompanied them on an inspection of the lot.

There is but slight conflict in the testimony as to where they went and as to the conversation that occurred. Plaintiff and Mr. Crozier walked to the rear of the lot. According to the testimony of Mrs. Crozier, she and defendant walked to an apple tree which is located 32 feet north of the alley. According to the testimony of defendant, they stopped a few feet north of this tree and approximately 16 feet south of the house. Some discussion was had as to trees growing upon the lot and as to a tree growing on the line between lot 21 and lot 22. Plaintiff and his witnesses testified that in the presence and hearing of defendant they discussed the erection of a garage on the end of the lot abutting upon the alley and the necessity for opening a gate to permit ingress and egress. Defendant denies that he heard any discussion relative to a garage or a gate. Mrs. Crozier testifies, also, that, inasmuch as she was to make the place her home, she was greatly interested in the lot, and that in her conversation with defendant she commented upon its ample size. Plaintiff and Mr. and Mrs. Crozier expressed their approval of the premises, and the defendant informed them that the contract of purchase and sale must be made with the real estate firm. Plaintiff went to the office of the real estate firm and signed a memorandum agreement whereby he agreed to purchase at the price fixed by the owner in the listing contract the "property known as 4005, Charles street, Omaha, Nebraska." Ten dollars was paid on the

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purchase price, and it was agreed that \$190 should be paid the following day, and \$800 more was to be paid within five days, if the abstract of title was found to show a merchantable title in the owner; and provisos were inserted covering the balance of the purchase price. Plaintiff made the payment of the amount falling due the following day, and in due season there was delivered to him an abstract of title which upon its caption page in bold lettering purported to show an abstract to "Lot 21, block 3, size of lot 50 ft. x 130 ft." Underneath this caption is a plat of 18 blocks for Orchard Hill addition to Omaha. This plat shows lot 21, block 3, to be 50 feet wide and 130 feet long and extending from Charles street to the alley, and the entire lot is shown in red; all other lots and parts of lots being in white. The cover of the abstract, however, contains the caption "Abstract of Title to North 85 feet of Lot 21, Block 3, Orchard Hill." It consists of 25 pages, some of which are written in longhand on both sides of the paper; some are in typewriting.

This abstract, however, does not cover all of lot 21 as shown by the caption page, but covers only the north 85 feet of the lot. Plaintiff, without noticing the description on the cover of the abstract, and believing that it covered all the ground he had inspected, sent the same to his attorney for examination. June 2 the attorney returned the abstract to plaintiff, pointing out certain defects in, or clouds upon the title, and these matters were satisfactorily arranged by the real estate agents. In addition to the contract heretofore mentioned, there is also found in the record a paper marked exhibit 5, which is long and intricate, bearing date May 26, 1920, and in this the property is described as the north 85 feet of lot 21, in block 3. Another paper marked exhibit 6, and designated "Agreement," appears to be a contract between the same parties for the purchase and sale of this property, and therein it is likewise described as the north 85 feet of lot 21, and block 3. There is some dis-

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pute as to the dates when these papers were signed, but the dates are not material. It is the contention of plaintiff that the contract signed May 20, when the first payment was made, is the real contract between the parties, and that the court should so hold and direct the conveyance of the entire lot to plaintiff, or if the subsequent papers signed, or either of them, is held to be the contract between the parties, that it should be so reformed as to include all of lot 21.

Plaintiff went into possession of the premises about July 1, 1920, believing that he was the owner of the entire lot. His tenants, Mr. and Mrs. Crozier, soon thereafter, in conversations had with neighbors, learned that defendant claimed the title to the south 45 feet. Plaintiff at once took steps to assert his right to all the property, and this suit followed. To our minds the conduct of defendant as shown by his own evidence should control the finding. He nowhere contradicts or questions the testimony of plaintiff and his two witnesses, except only on the immaterial matter as to the exact point where he stood while showing the lot. According to the testimony for plaintiff, defendant went upon the 45-foot tract that is in dispute, and stood under an apple tree growing thereon while plaintiff and his friends were inspecting the premises. According to defendant's testimony he walked to a point which, if this decree is upheld, is approximately the dividing line between the property sold and the property retained. He was asked if his stopping at this point had "anything to do with the fact that you were only seeking to sell 85 or 90 feet?" He answered: "I don't think so." When pressed as to whether he mentioned to these parties that he was selling less than the whole lot, he replied: "I didn't need to say anything." To the question, "And when they went back to the alley you suggested nothing as to how far the lot ran back?" he answered: "Didn't say anything about it." Further on in his examination he gave the following testimony: "Q. Did you remember at the time

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that you were showing this property that you had listed 50 by 90 feet? A. Yes; I knew I had. Q. Why didn't you tell them that when they were in the back yard? A. Well, I don't know why I didn't, because I decided afterwards I had made a mistake on it. Q. When was that? A. I decided afterwards that I had made a mistake on that 90 feet, I had fixed out the boundaries over there so they would run right through and make a jog of 5 feet. Q. Well, assuming that you would only show 85, as you did in the contract, finally, why didn't you tell them in the back yard about that, when they were talking back in the yard? A. I don't know why I didn't."

Defendant saw plaintiff make the inspection of the entire lot; knew he was contracting with reference to the whole and not for a part only. Defendant stood mute when it was his duty to speak the truth, and thus he perpetrated a fraud against which a court of equity will grant relief.

It is not material which one of the papers signed is held to be the real contract. The whole transaction is before the court. The conclusion is irresistible that plaintiff by the conduct of defendant was led to believe, and did believe, that the papers and contracts signed called for the entire plot of ground shown him by defendant, and he is entitled to his bargain.

The judgment of the district court is reversed and the cause remanded, with directions to the district court to enter a decree reforming the contract as prayed in the plaintiff's petition.

REVERSED.

LARS LINDSTROM, APPELLEE, V. JOHN BEACOM ET AL.,
APPELLANTS.

FILED JULY 9, 1923. NO. 22488.

1. **Bills and Notes: PAYMENT: BURDEN OF PROOF.** "If the maker elects to pay a negotiable promissory note to one who cannot and does not produce the note, by so doing he assumes the burden of showing that the party to whom he paid it was the owner of the

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note, or was authorized by the owner to receive the money for him." *Coddington Savings Bank v. Anderson*, 64 Neb. 205.

2. *Peterson v. Kuhn*, ante, p. 372, followed.

APPEAL from the district court for Hamilton county:
GEORGE F. CORCORAN, JUDGE. *Affirmed*.

Horth & Ryan, for appellants.

Hainer, Craft, Edgerton & Fraizer, contra.

Heard before MORRISSEY, C. J., LETTON, and GOOD, JJ.,
BLACKLEDGE, COLBY and REDICK, District Judges.

LETTON, J.

This is an action to foreclose a mortgage upon certain real estate in Hamilton county. The defendant, Beacom, procured a loan from W. C. Wentz Company of Aurora, loan brokers. He executed a note to that company as payee and a mortgage upon the property involved to secure the payment of the same. Before maturity of the note the plaintiff, Lindstrom, who is a retired farmer 80 years old, living in Aurora, purchased the note of the Wentz Company with money derived from the sale of a piece of property he owned, and the note, interest coupons and assignment of mortgage were delivered to him. The mortgage was at that time in the county clerk's office for the purpose of being recorded, but he received it about a week later. He took these papers to the Fidelity Bank, where he did his banking, and where he had a safety deposit box, and placed them in the box. They remained there until after the W. C. Wentz Company went into the hands of a receiver. The assignment of mortgage was not recorded until after this occurred. The plaintiff had done no business with the Wentz Company before this, except to renew an insurance policy upon some property which he had purchased. When he bought the note, Mr. Wentz told him he would cash the coupons. Two of the three coupons were paid to him at the office of the Wentz Company by that company. Another coupon the Fidelity Bank cashed for him. He never notified defendant that he owned the note and

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mortgage. Plaintiff had never bought from or sold property to the Wentz Company, and had no business transactions with them prior to this, except the renewal of the insurance policy mentioned. The Wentz Company never had the notes or mortgage in their possession after delivery to plaintiff, except that the coupons were surrendered to them when they paid plaintiff the amounts due upon them.

Defendant paid one interest coupon, and the note for the principal, before it became due, to the Wentz Company without receiving the note or the coupon. He now contends that the Wentz Company had ostensible, implied and apparent authority to collect the same, and was in fact the agent of plaintiff at that time for the collection of the debt and interest, and that this was sufficient to satisfy the mortgage.

The same contentions were made in the case of *Peterson v. Kuhn*, ante, p. 372. The facts in that case are very similar to the facts in this case. There was just as much reason for the contention in that case that the Wentz Company had ostensible authority to collect the principal and interest as there is in this case. The legal points involved are considered in the opinion in the *Peterson* case, and no good purpose can be subserved by a repetition of the discussion.

AFFIRMED.

ROBERT HAYES ET AL., APPELLEES, V. CHARLES PILGER
ET AL., APPELLANTS.

FILED JULY 9, 1923. No. 23087.

1. **Habeas Corpus:** RELEASE: FEDERAL PRISONERS. As a general rule, state judges and state courts have no right to release a party on habeas corpus if it appears upon the application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government.
2. ———: ———: JURISDICTION. The jurisdiction in such a case rests with the courts of the United States, and not with the courts of the state.

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3. **Criminal Law: PRISONERS: UNLAWFUL DETENTION.** Unexplained delay in filing a complaint and having a warrant issued for about 36 hours after the petitioners were arrested, without warrant, or complaint, and incarcerated in jail on a charge of violation of the national prohibition law, is unreasonable, oppressive, and unlawful.
4. **Habeas Corpus: RELEASE: UNLAWFUL DELAY.** Under such circumstances, the authority to detain in custody without a warrant ceases, even on the part of those asserting themselves to be officers of the United States, and a state court has the right to discharge persons so unlawfully held without warrant or complaint.

APPEAL from the district court for Madison county:
WILLIAM V. ALLEN, JUDGE. *Affirmed.*

James C. Kinsler and Don W. Stewart, for appellants.
Webb Rice, contra.

Heard before MORRISSEY, C. J., LETTON and ALDRICH,
JJ., BLACKLEDGE and COLBY, District Judges.

LETTON, J.

Petition for a writ of habeas corpus; the petitioners were discharged; respondents appeal.

The proceeding was brought against Charles Pilger, chief of police of Norfolk, Nebraska, who has charge of the city jail, and three other defendants. It is alleged, in substance, that the latter three defendants "claimed to be police officers of the United States," commonly known as "booze hounds;" that the petitioners were arrested in Tilden, Antelope county, Nebraska, on July 5, and placed in the custody of Pilger at the jail in Norfolk, Madison county, on July 6; that no charge of any kind has been filed, or is pending against them in any court, or before any magistrate, or federal commissioner; that no warrant has been issued, and that they are detained at the caprice of the defendant; that they have been denied any right to consult an attorney, or to give bail; and that no charges will be filed until a representative of the federal district attorney arrives upon July 8; and that the imprisonment is unlawful.

The return alleges that the defendants, except de-

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endant Pilger, are "general prohibition agents of the United States of America;" that the applicants were arrested without a warrant, and that complaints were filed about 2:30 p. m. on July 7, and warrants issued.

The court found: "That the petitioners Brittell and Wendt were arrested and taken into custody by the defendants McMillan, Whitney and Gibson in the town of Tilden, Nebraska, at about the hour of 10:30 o'clock p. m. on the 5th day of July, 1922; that the petitioners Hayes and Casey were arrested and taken into custody by the said defendants at about the hour of 1:30 o'clock a. m. on the 6th day of July, 1922; and that said arrests were made by said defendants without any warrant or other process, and without any complaint having been filed before any magistrate or in any court, and without any charge or purported charge having been filed with any officer; but the said defendants claim that the petitioners Hayes and Casey were taken in the act of violating the national prohibition laws, and that the petitioners Wendt and Brittell were claimed by defendants to have violated the national prohibition laws.

"The court further finds that following said arrests the said defendants transported said petitioners to the city of Norfolk at about the hour of 4:00 o'clock a. m. on the 6th day of July, 1922, and placed said petitioners in the city jail of the city of Norfolk, and in the custody of Charles Pilger, who is chief of police and *ex officio* jailer of said city.

"The court further finds that said petitioners were imprisoned in said jail all of the 6th day of July, 1922, without any charge having been filed before any magistrate, and were further imprisoned without any charge having been filed against them until about the hour of 2:30 o'clock p. m. on the 7th day of July, 1922, and that no warrant or other process was served on the said petitioners during any of the times herein stated.

"The court finds that the imprisonment and detention of said petitioners for said time without process or any

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charge filed against them was and is wrong and unlawful, and that said petitioners and each of them are entitled to be discharged upon their petition in habeas corpus.

"It is therefore ordered and adjudged that the petitioners be, and they hereby are, discharged, at the defendants' costs."

It is not clear whether any evidence was adduced other than what purports to be a stipulation of facts made at the trial. This is attached to the transcript, but was not settled and allowed as a bill of exceptions and is not a part of the record, and cannot be considered. *Backes v. Schlick*, 82 Neb. 289. We can only determine whether the pleadings support the judgment.

The contention of the United States district attorney on this appeal is that a state court has no authority to discharge in habeas corpus proceedings a prisoner held under the authority, or claim, or color of authority of the United States. Reliance is placed on *Ableman v. Booth*, 62 U. S. 506, and *Tarble's Case*, 80 U. S. 397, 409. In the first case the prisoner was held under complaint and warrant. In the latter the relator had been enlisted in the military service of the United States, and was held under claim and color of authority of the United States by a military officer of the government. It was held that the courts or judicial officers of the United States alone had authority to release the petitioner. It is said in *Tarble's Case*:

"State judges and state courts, authorized by laws of their states to issue writs of habeas corpus, have undoubtedly a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, unless it appear upon his application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government. If such fact appear upon the application, the writ should be refused. If it do not appear, the judge or court issuing the writ has a right to inquire into the cause of imprisonment, and ascertain by what

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authority the person is held within the limits of the state; and it is the duty of the marshal, or other officer having the custody of the prisoner, to give, by a proper return, information in this respect. His return should be sufficient, in its detail of facts, to show distinctly that the imprisonment is under the authority, or claim and color of the authority, of the United States, and to exclude the suspicion of imposition or oppression on his part. And the process or orders, under which the prisoner is held, should be produced with the return and submitted to inspection, in order that the court or judge issuing the writ may see that the prisoner is held by the officer, in good faith, under the authority, or claim and color of the authority, of the United States, and not under the mere pretence of having such authority."

There is no finding that the respondents are officers of the United States; but, assuming them to be such, the circumstances in the present case do not "exclude the suspicion of imposition or oppression" at the hands of officers of the United States. There are no facts shown which excuse or palliate the delay in filing complaints and procuring the issuance of warrants, within a reasonable time. It is clear that an unexplained delay of more than 36 hours after arrest before filing a complaint is unreasonable and oppressive, where the arrested person is confined in jail nearly all of this time. There is no proof that any one of the petitioners was in the act of violating the prohibition law, or that he had violated this law before his arrest. More than a reasonable time had elapsed after the arrest within which to file a complaint and procure the issuance of a warrant, the detention was unlawful thereafter, and petitioners were entitled to discharge.

AFFIRMED.

Goldmark & Sons v. Simon Bros. Co.

**ADOLPH GOLDMARK & SONS, APPELLEE, v. SIMON BROTHERS
COMPANY, APPELLANT.**

FILED JULY 9, 1923. No. 22388.

1. **Sales:** NONACCEPTANCE: RESALE: In the resale of goods which the consignee unreasonably refuses to accept, the manner of sale is within the reasonable discretion of the seller, and when made in good faith and so as to produce a fair price for the goods, the consignor cannot ordinarily be charged with negligence.
2. ———: INSTRUCTION: "MERCHANTABILITY." The court submitted the following instruction: "The term 'merchantability' does not require that the article shall be of first quality, but means that the article shall be vendible upon the market in the ordinary course of business and at the average price of such article, having in view the kind of article referred to in the contract." The instruction conforms in all essential respects to the accepted rule as applied to the term used. Error cannot be predicated upon the fact that the jury were so instructed.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

Arthur Rosenblum and Lambert, Shotwell & Shotwell,
for appellant.

Kennedy, Holland, De Lacy & McLaughlin, contra.

Heard before MORRISSEY, C. J., LETTON and DEAN, JJ.,
BLACKLEDGE and COLBY, District Judges.

DEAN, J.

Plaintiff sold to defendant for delivery at Omaha a car-load of Madagascar Lima beans, consisting of 40,000 pounds, at 12½ cents a pound f. o. b. New York. Upon arrival of the shipment, defendant, alleging that the beans were inferior to the quality which plaintiff contracted to deliver, refused acceptance. Thereupon plaintiff, as alleged, "in order to mitigate the damages, retook possession of the car and, after due notice to defendant," sold the shipment in small lots. The net receipts were \$1,927.31, after deducting \$573.28 for expenses which it was alleged were necessarily incident to the resale. The net proceeds were applied to defendant's credit and this action was brought to recover \$2,666.69 with interest at

7 per cent. from January 1, 1920, that being the balance alleged to be due plaintiff at the contract price. A verdict was returned for plaintiff for \$2,666.69 and \$255.63 interest. After disallowing a few expense items, the court ordered that the verdict be reduced to \$2,854.09, and rendered judgment in that amount for plaintiff. Defendant appeals.

The material part of the contract entered into by the parties follows:

"Contract for Madagascar Lima beans. New York, Oct. 11, 1919. Sold by Adolph Goldmark & Sons, Inc., to Simon Brothers Co., Omaha, Neb.

"Quantity, Article and Description. Forty-thousand (40,000) pounds of Madagascar Lima beans, fair average quality, current crop, packed in bags of about 80 to 110 pounds each, seller's option.

"Shipment or Delivery. October November shipment from Europe, or equivalent delivery. No arrival no sale.

"Price and Terms. Twelve and one half ($12\frac{1}{2}$) cents per lb., duty paid, f. o. b. New York, New York weights, gross for net. Net cash, sight draft against B. L. Privilege inspection upon arrival. * * * Accepted, Adolph Goldmark & Sons, Inc."

Ralph W. Goldmark is the president of plaintiff corporation, its legal residence being in New York City. He testified that the words "privilege inspection upon arrival" were inserted in the contract upon the request of Mr. W. J. Simon who signed for defendant, and that they have a well-recognized meaning in the bean trade, which in effect is that the buyer has the privilege of examining the merchandise upon arrival to satisfy himself that the goods are in accordance with the contract of sale, and if they do conform thereto the buyer is obligated to accept the goods. The secretary of the plaintiff corporation testified that his firm had dealt in and he had examined Madagascar Lima beans since 1913, and that the quality of the samples in question

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was equal, if not superior, to the fair average quality of Madagascar Lima beans of the current 1919 crop.

Additional evidence was submitted by the parties on the question of quality and as to whether the shipment was merchantable. Three grain inspectors in the employ of the Omaha Grain Exchange took 50 samples of the beans at random out of the car January 2, 1920. For examination and report they gave one third of each sample to the Kohn Brothers Brokerage Company, of Omaha, and took the remainder to the Grain Exchange office, and sent about one third of the remaining samples to the New York Dried Fruit Association, where they were examined by a committee consisting of three disinterested members, appointed by the president, who were familiar with the trade. The evidence of one member of the committee was in substance that the samples were equal, if not superior, "to the fair average quality of Madagascar Lima beans of the crop which was current in October, 1919." The report of another was in effect that the beans were fully equal to, if not better than, the fair average quality of the 1919 crop, and, in the opinion of the third member, the sample was one of the best of the lots of the 1919 crop and above its fair average quality.

W. S. Frisbie, chief of the bureau of food products of Nebraska, testified that he made an examination from samples sent to the bureau for inspection and analysis, and that a laboratory chemist made an official inspection which he, the witness, saw, but that he did not make a record of his findings. He testified: "Q. Now, what would you say as to the percentage of infestation shown here, 6 and a fraction per cent., as an unusual amount of infestation for beans gathered from the field without being hand-picked? A. I wouldn't class that percentage as unusual. * * * Q. What per cent. of beans are usual to be infested as they come out of the field, do you know that? A. Why, yes; 5 per cent., anywhere around 5 or 6 per cent. is not at all unusual," and that

"there are some so called picked beans which will run that high." It appears that his evidence was based, not only upon his own experience, "but upon the past experience of the bureau of chemistry of the United States department of agriculture," that department having examined thousands of cases.

On the part of defendant Mr. Jake Simon, who is its general manager, testified on the question of quality. He said that some of the bags "turned up as high as 20 to 25 per cent. bad," or what he would call worm infested; that he found no worms, but found beans with worm holes in them; that he "took a pile here, a pile there, and kind of estimated the piles of beans there were that was bad," and estimated that from 10 to 12 per cent. were bad, and that a blemished bean is one with a spot on it. He said he knew that in some years Madagascar Lima beans "run damaged."

A witness who was in defendant's employ when the consignment arrived testified that under Mr. Simon's direction he tested 15 or 20 bags and found no worms, but that he found "wormy" beans among them, but had no opinion as to the general condition of the shipment.

Some evidence was introduced on the part of defendant tending to prove that the beans were not merchantable, and that beans which showed that 6 11/12 per cent. were damaged could not be sold in the usual course of trade in Omaha except at a reduced price. The attention, however, of a witness on the part of defendant was directed to certain named grocery houses in Omaha, Sioux City, and Beatrice, to which considerable quantities of the shipment were sold, and he testified that they were reputable grocers and that they sold to a good class of trade. There was also evidence offered by defendant tending to prove that plaintiff, as an inducement to the contract, represented that the beans were equal to and larger than California beans:

but this was denied by plaintiff. This, among others, was a question of fact for the jury.

Defendant contends that the resales were not made within a reasonable time and that due diligence was not exercised to procure the best prices obtainable. Mr. H. L. Scott is a member of the Kohn Brokerage Company, and as such had charge of the resale of the shipment and his evidence was submitted to the jury. From this it appears that he made repeated sales in June, July, and August, 1920, to one of the leading grocery firms in Omaha, aggregating 9,488 pounds at 9 cents a pound, and that he sold quantities to grocers in Sioux City, Beatrice, Crawford, Deadwood, South Dakota, Pipestone, Minnesota, and to other concerns elsewhere, and that the purchasers were all reputable dealers selling to a good class of trade. With respect to the standing of the purchasers he was corroborated by other witnesses, at least one of whom appeared on the part of defendant. As tending to show diligence, the witness testified that he circularized the trade at considerable expense.

It appears that for the beans sold from June to August, inclusive, 9 cents a pound was realized, but in September the sale price was only 7 cents and $7\frac{1}{2}$ cents, and finally the price fell to $4\frac{1}{4}$ cents on the last sales. He said that the market depression was caused in part by competition with the California product. Mr. Scott also testified concerning other sales, and a conditional offer from Chicago, at 10 cents for the entire lot, less freight, which, under the circumstances, plaintiff was apparently justified in rejecting. Anyhow, it was not a question of law for the court, but was a question of fact for the jury. From all the evidence we conclude that, in respect of making sales and obtaining as good prices as the circumstances of a falling market permitted, and with respect to the standing of the purchasers, the jury were justified in finding that plaintiff exercised reasonable diligence.

The rule is that, in the resale of goods which the consignee unreasonably refuses to accept, the manner of sale is within the reasonable discretion of the seller, and when made in good faith and so as to produce a fair price for the goods, the consignor cannot ordinarily be charged with negligence. 35 Cyc. 523, and cases cited.

A large part of defendant's argument is devoted to the proposition that the beans were not of a merchantable quality, and exceptions were taken to instructions given by the court on this and other submitted questions. The fact that the shipment was sold in separate parcels to five or six dealers whose trade consisted of a good class of customers appears to answer the argument of defendant. And to one of the largest dealers in Omaha sales were repeatedly made. On this point the court properly instructed the jury that by the contract "plaintiff impliedly warranted that the beans should be fit for human food and merchantable in character, and if you believe from the evidence that they failed to comply with either of these requirements you should find for defendant."

The court further instructed the jury: "The term 'merchantable' does not require that the article shall be of first quality, but means that the article shall be vendible upon the market in the ordinary course of business and at the average price of such article, having in view the kind of article referred to in the contract, and, therefore, if you find from a preponderance of the evidence that the beans in question were Madagascar Lima beans, fair average quality, current crop, as provided in the contract, and you further find from the evidence that they were merchantable as above defined, and fit for human consumption, your verdict should be for the plaintiff."

We think the instruction conforms in all essential respects to the accepted rule as applied to the term "merchantable." In *Warner v. Arctic Ice Co.*, 74 Me. 475, it was held: "While the purchaser without special

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warranty cannot insist that the article should be of any, especially, particularly, good, quality, there would be an implied warranty on the part of the seller that it is of fairly merchantable quality." In the same case the court submitted this question for special finding to the jury: "'Was or was not the ice on board these vessels, fair, merchantable ice for the market for which both the parties knew it was intended, when it was put on board at Woolwich?" And the jury answered, 'It was.' Exceptions being taken to the submission of this inquiry, held, no error."

"The word 'merchantable' in a contract, means generally vendible in market (2 Bouvier, Law Dictionary, p. 400); and, when unqualified in any way, such is its general meaning. It would be difficult, if not impossible to give an inflexible definition of the word 'merchantable.' Much in each case would depend on whether the article to be dealt in is susceptible to a fixed and uniform standard, or is of a variable nature, and is also dependent upon the conditions and circumstances surrounding each case." 5 Words and Phrases, 4490.

The case appears to have been fairly submitted to the jury under instructions in which error does not appear. The judgment of the district court is therefore

AFFIRMED.

WILBUR LARSON, v. STATE OF NEBRASKA.

FILED JULY 9, 1923. No. 23199.

1. **Rape:** CORROBORATIVE EVIDENCE. Opportunity alone, to commit the crime of rape, is not corroboration of the evidence of the complainant.
2. ———: REVERSAL: INSUFFICIENT EVIDENCE. While we recognize the rule that the jury are the judges of questions of fact, we do not hesitate to set aside a verdict where the evidence is clearly insufficient to sustain it. And this is of particular importance in a case involving the question of liberty or of life.
3. ———: CORROBORATIVE EVIDENCE. "In a prosecution for the crime commonly called statutory rape, where the prosecuting witness

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testifies positively to the facts constituting the crime, and the defendant as positively and explicitly denies her statements, her testimony must be corroborated by facts and circumstances established by other competent evidence in order to sustain a conviction." *Mott v. State*, 83 Neb. 226.

4. **Evidence** examined, and *held* insufficient to support the verdict.

ERROR to the district court for Nuckolls county:
RALPH D. BROWN, JUDGE. *Reversed*.

J. H. Agee and F. H. Stubbs, for plaintiff in error.

O. S. Spillman, Attorney General, and *Lloyd Dort*,
contra.

Heard before MORRISSEY, C. J., LETTON, GOOD and
DEAN, JJ., BLACKLEDGE, District Judge.

DEAN, J.

Wilbur Larson, defendant, aged 21, was convicted in Nuckolls county of committing statutory rape upon the person of Georgia Stinnett, under the age of 15 years, and was sentenced to serve a term of four years in the reformatory for men. He alleges error and has brought the case here for review.

Defendant is complainant's brother-in-law, he having married her sister in October, 1920. It is charged that the offense was committed August 13, 1921, when defendant and his wife were living at Superior and complainant and her mother were living eight blocks away in the same town. The complaint was filed a little more than eight months after the alleged commission of the offense, namely, May 10, 1922. Complainant testified that defendant came to her mother's home, August 13, in the forenoon when she was there alone; that as soon as he entered the house he at once announced the lewd purpose for which he came, which was followed by the assault of which complaint is made; that afterward she drove him away and the next morning she told her mother about it. She further testified, without objection, that not long before that time, on a certain evening, he conducted himself in an unseemly manner toward her

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in her sister's home where she was visiting; that at the time she and her sister and defendant were all lying on a bed, her sister being drowsy for a part of the time; that defendant took hold of her hands and "dragged" her into a sitting-room which joins the bedroom, and took certain liberties with her, and that her sister, defendant's wife, looking from the darkened room through the open door into the lighted sitting room watched "this that was going on in the front room."

Mrs. Matilda Larson, defendant's wife, was called as a witness and, without objection, in part corroborated the evidence of her sister with respect to defendant's conduct while visiting at defendant's home. She testified that she, Mrs. Larson, went into the adjoining front room, and that her sister said she wanted to go to bed, and that the three went up-stairs together; that her husband, because he is crippled in one arm and one leg, walks just about half as fast as a person who is physically normal; that when he goes up-stairs he "puts his good foot up first and then his other one next, a step at a time; that instead of walking straight up the stairway he turns sideways so that he can put his right foot up first;" that she talked with her husband about the alleged offense and he denied that he was guilty. It appears that they were not living together when the case was tried.

Mrs. Stinnett is complainant's mother and was employed in a hospital at Superior in the daytime. She testified that, on the evening of August 13, complainant came to the hospital and, appearing to be quite warm, she asked her "what she had been running for," and that she answered that she was in a hurry and that defendant "had been out there;" that when she returned from her work at the hospital that evening she noticed that the bed in the front room was rumpled and the pillows were out of place; that her daughter did not then tell her that anything unusual had happened, but the next day told her of "defendant's having had or

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attempting to have sexual intercourse with her."

When the prosecution announced its rest, defendant's counsel demurred to the evidence on the ground that it "failed to make out a case to prove the offense charged against the defendant in the information, and particularly failed to prove any corroboration of the offense." The demurrer was overruled and defendant's evidence was submitted.

Defendant by occupation is a moving picture operator. He denied all of the evidence which tended to prove his guilt. With respect to complainant's evidence concerning the alleged happenings at his home on the occasion of her visit there, and concerning which his wife testified, his version is that in the evening the complainant and his wife left him seated in the front room reading, where he remained while his wife and her sister lay down on the bed in the adjoining room; that some time afterward he went into the bedroom and told complainant to get up and go upstairs to bed; that she said she was afraid to go up-stairs in the dark, and he told his wife to go with her; that his wife also appeared to be afraid of the darkness and asked him to go along, and that he did so because his wife, being a short woman, could not reach an electric bulb to change it from one room to another, and, it being dark, she would experience some trouble if she tried to do so: that complainant, "who was always running and being at the head all of the time," was the first to go up-stairs; that as soon as he changed the bulb in the light fixture he immediately went down-stairs. He specifically denied all of the testimony which was introduced by the state with respect to his improper conduct on all the occasions referred to by the state's witnesses. He corroborated his wife's statement wherein she said she talked to him about the charge against him, but to that he added that she told him at the same time that "she didn't believe it at all, that there was nothing to it, she couldn't

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understand why her mother would start anything like that."

With respect to his physical condition, defendant testified that he was paralyzed in one arm and in one leg as the result of an accident when he was a child of five years; that his right arm, which is crippled, has about half the strength of the other, and that he has always been compelled to wear a brace on his paralyzed leg in order to move about. It may here be recalled that his wife's evidence corroborates that of defendant with respect to his crippled condition.

The state's evidence appears to be lacking in respects that appear to us to be material. If complainant was abused, as charged in the information, it is reasonable to believe that a physical examination, of a person of her age, would have afforded some corroborative evidence of the charge of mistreatment, though it would not, of course, be conclusive against the person charged without other corroboration. As corroborative of the complaint, a neighbor woman testified that she saw defendant in a grape arbor in the yard of his mother-in-law in the forenoon of August 13, and said that the complainant, who had promised that day to come to her house for dinner, failed to come. It is urged that defendant had the opportunity to commit the offense. But a moment's reflection will convince a reasonable person that opportunity alone is not corroboration. *Fitzgerald v. State*, 78 Neb. 1; *Mott v. State*, 83 Neb. 226.

The rule which has long prevailed in this state is that, in a rape case, "where the prosecuting witness testifies positively to the facts constituting the crime, and the defendant as positively and explicitly denies her statements, her testimony must be corroborated by facts and circumstances established by other competent evidence in order to sustain a conviction." *Mott v. State*, 83 Neb. 226; *Fitzgerald v. State*, 78 Neb. 1. If the legislature is desirous that the rule which has so long prevailed shall be superseded by a different rule,

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it is within its power to enact such rule. In its wisdom it has not done so, and we are not disposed to usurp the function of the law-making body. Doubtless the legislature, whose attention has been directed to the rule in question, takes notice of the universally conceded fact that the charge of rape is easy to make but is one of the most difficult to defend against, and this in part because it is the most dastardly offense that is known to the calendar of crime.

Under the law a complainant in a rape case, who is under the age of consent, is not required to resist her assailant's advances. But in the present case the complainant, though under the age of consent, testified that defendant forcibly committed the offense without her consent. She also testified that, though an elderly couple was living in another part of her mother's six-room house at the time, she made no outcry, giving as a reason therefor that she "wouldn't scream to let all the neighbors know this rumpus was going on." After the offense was committed she said she drove defendant away. Whether the act was committed with or without her consent would of course be immaterial so far as constituting an offense under the statute is concerned. But the circumstances which complainant details are proper to be considered as affecting her credibility.

The evidence with respect to the charge against defendant taxes our credulity. It seems that a man who from his infancy has been a cripple, and who has ever since been compelled to hobble about on a paralyzed leg with an artificial brace, and from whose right arm the strength has departed would be incapable of exerting the physical activity attributed to him in the premises. In the oral argument counsel did not hesitate to charge that the filing of the complaint was a plot, or conspiracy, deliberately planned by complainant's family, and in this connection it was observed that the fact was unusual that a complaint was not filed for more than

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eight months after the alleged commission of the offense. It may be added that the prosecution frankly concedes that "the evidence is not as satisfactory as in some cases."

While we recognize the rule that the jury is the judge of questions of fact, we do not hesitate to set aside a verdict where the evidence is clearly insufficient to sustain it. And this is of particular importance in a case involving the question of liberty or of life. That the record discloses a reasonable doubt of defendant's guilt sufficiently appears. *Gammel v. State*, 101 Neb. 532; *Force v. State*, 105 Neb. 175.

Upon a review of the entire record, we conclude that the verdict is not supported by the evidence. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

GUST LINDBERG, APPELLANT, V. OSCAR W. CHALLBURG ET AL., APPELLEES.

FILED JULY 9, 1923. No. 22428.

Highways: DRAINAGE: INJUNCTION. "Public authorities may construct drains along the side of highways if necessary to render the road passable. If in so doing they divert the waters of a pond out of the natural course of drainage and upon the lands of one not consenting to the work, they may not, ordinarily, if the work is done in good faith, be enjoined; but they may be liable for damages to persons whose lands or crops are injured." *Wachter v. Lange*, 94 Neb. 290.

APPEAL from the district court for Clay county: WILLIAM A. DILWORTH, JUDGE. *Affirmed*.

John B. Scott and Epperson, Massie & Epperson, for appellant.

W. L. Minor and C. L. Stewart, contra.

Heard before MORRISSEY, C. J., ALDRICH and DAY, JJ., COLBY and REDICK, District Judges.

DAY, J.

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By this action the plaintiff sought a permanent injunction against the defendants, who are the county supervisors of Clay county, restraining them from making certain road improvements along the public highway abutting the plaintiff's farm. It is the claim of the plaintiff that the effect of the proposed improvement will be to cast additional surface water upon his land.

Upon the filing of the petition a temporary restraining order was granted by the county judge, which was upon a hearing by the district court continued in force until the trial of the case. Upon the trial of the case on its merits the court dissolved the temporary injunction, denied a permanent injunction, and dismissed the plaintiff's action. Plaintiff appeals.

It appears that the plaintiff is the owner of the northeast quarter of section 5, township 7, range 5, in Clay county. The northwest quarter of section 4 lies immediately east of plaintiff's land. North of sections 5 and 4 are sections 32 and 33. A public highway, popularly known as the "D. L. D.," extending east and west, separates sections 5 and 4 from sections 32 and 33, and a county road running north and south separates sections 5 and 32 from sections 4 and 33. The natural surface of the ground at the intersection of these two highways presents a depression or basin; its lowest point being near the center of the intersection. From the rim of the basin the land slopes from every direction toward the center. This basin has no outlet. The only escape of the surface water is by evaporation or percolation. The rim of the basin which presents an irregular outline is from three to five feet higher than the lowest point in the basin. At times of heavy rainfall or melting snow the surface water forms a pond at the intersection of the two roads which at times seriously interferes with the use of the highways by the public. To remedy this difficulty the highway at the intersection was graded up a trifle over two feet; the grade extending back from the intersection in each direction for a considerable distance. Along

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the sides of the highway ditches were dug and culverts constructed in such a manner that the surface water which congregated at the intersection was carried south along the ditches about 600 feet, at which point, when the water in the ditch rose about two feet, it would be discharged in a low place upon the plaintiff's land.

It was charged in the petition that the construction of the roads and ditches in the manner proposed by the defendants would divert the water from lagoons located on sections 32 and 33 onto the plaintiff's land. This charge is not sustained by the evidence. The evidence shows that the only surface water which would be diverted upon the plaintiff's land is the water in the basin having its center at the intersection.

That the improvement contemplated and being carried out by the defendants when the restraining order was served was a necessary improvement for the benefit of the public appears to be well sustained by the evidence. That the defendants were acting in good faith is not questioned. The point at which the water left the ditches and entered upon the plaintiff's land is described by the witnesses as a "swale." From this point the water would spread out in an irregular outline and, after following the low places for some 1,400 feet, it would enter a ditch with well-defined banks which formed a natural drainage for the lands in that vicinity.

A good deal of discussion appears in the brief as to whether this "swale" was the heading of a natural channel. In the view we have taken of the case a number of questions discussed need not be considered. Without expressing any opinion as to the merits of the plaintiff's claim, we are of the view that in seeking an injunction he has mistaken his remedy. The facts in this case bring it within the rule announced in *Wachter v. Lange*, 94 Neb. 290, in which, following the reasoning of *Churchill v. Beethe*, 48 Neb. 87, it is held:

"Public authorities may construct drains along the

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side of highways if necessary to render the road passable. If in so doing they divert the waters of a pond out of the natural course of drainage and upon the lands of one not consenting to the work, they may not, ordinarily, if the work is done in good faith, be enjoined; but they may be liable for damages to persons whose lands or crops are injured."

It follows from what has been said that the judgment of the trial court is right, and it is, therefore,

AFFIRMED.

T. B. BUSBOOM ET AL., V. STATE OF NEBRASKA.

FILED JULY 9, 1923. No. 23130.

Constitutional Law: SCHOOLS: FOREIGN LANGUAGE LAW. Chapter 61, Laws 1921, appearing as sections 6457 to 6462, inclusive, Comp. St. 1922, is void, because it violates the Fourteenth Amendment to the federal Constitution.

ERROR to the district court for Lancaster county:
ELLIOTT J. CLEMENTS, JUDGE. *Reversed and dismissed.*

C. A. Sorensen and F. L. Bollen, for plaintiffs in error.

Clarence A. Davis, Attorney General, and *Mason Wheeler*, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN, DAY and GOOD, JJ., RAPER, District Judge.

GOOD, J.

Defendants, as officers and persons in authority of St. John's Evangelical Lutheran Church, a religious organization located at Emerald, in Lancaster county, Nebraska, were convicted of unlawfully passing and enforcing and attempting to enforce a prohibition and discrimination against the English language in certain religious meetings and proceedings, held and sought to be held in said county and state, contrary to the provisions of section 6460, Comp. St. 1922, and they bring the case to this court on error.

Said section 6460 was enacted into law as section 4,

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ch. 61, Laws 1921. Said act appears in the Compiled Statutes of 1922 as sections 6457 to 6462, inclusive. Since the submission of this case in this court, the statute has been held void by the United States supreme court, because it violates the Fourteenth Amendment to the federal Constitution. *Nebraska District of Evangelical Lutheran Synod v. McKelvie*, 262 U. S. 404. See, also, *Meyer v. State*, 262 U. S. 390. These decisions supersede the opinion of this court in *Nebraska District of Evangelical Lutheran Synod v. McKelvie*, 108 Neb. 448, and in *Meyer v. State*, 107 Neb. 657.

Since the statute under which the prosecution was had is void, it follows that the defendants were unlawfully convicted. The judgment is reversed and the action dismissed.

REVERED AND DISMISSED.

WADE A. WILSON, APPELLANT, v. CHARLES E. MATSON,
APPELLEE.

FILED JULY 9, 1923. No. 23451.

- 1 **Elections: CONTEST: BOND.** Section 2070, Comp. St. 1922, construed, and held to require a contestant in an election contest proceeding to file a bond for costs within 20 days after the votes are canvassed.
2. ———: ———: **SPECIAL PROCEEDING.** The right, conferred by statute on a candidate for public office to contest the election of his apparently successful rival, is a special statutory proceeding, and all the conditions prescribed for its exercise must be strictly followed.
3. ———: ———: **BOND.** The filing of a bond for costs within 20 days after the votes are canvassed, as required by section 2070, Comp. St. 1922, is necessary to give the court jurisdiction to hear and determine an election contest.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Affirmed.*

C. A. Sorensen and F. L. Bollen, for appellant.

Peterson & Devoe, contra.

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Heard before MORRISSEY, C. J., LETTON and GOOD, JJ., BLACKLEDGE, COLBY and REDICK, District Judges.

GOOD, J.

Appellant and appellee, who will be hereinafter referred to, respectively, as contestant and incumbent, were rival candidates for the office of county attorney of Lancaster county, Nebraska, at the general election held in November, 1922. The votes cast at said election were officially canvassed on November 15, 1922, and the results showed that incumbent received 304 more votes for said office than were cast for contestant. On November 28, 1922, contestant filed his complaint in the county court of Lancaster county, to contest the election of the incumbent to said office, and summons was issued thereon on December 2, 1922. On December 7, 1922, and more than 20 days after the official canvass of the votes, incumbent filed a motion to dismiss the proceedings, for the reason that contestant had not filed a bond as required by section 2070, Comp. St. 1922. On December 9, 1922, contestant filed a bond, which was approved by the court, and incumbent's motion to dismiss was later overruled. A trial in the county court resulted favorably to incumbent. The contestant appealed to the district court. Thereupon, incumbent filed in the district court a motion to dismiss the appeal for want of jurisdiction, because of the failure of contestant to file a bond in the county court within the time required by statute, which motion was sustained, and judgment entered dismissing the appeal. Contestant brings the case to this court to review the judgment of the district court dismissing his appeal.

Two questions are presented by this appeal: (1) Does section 2070, Comp. St. 1922, when properly construed, require contestant, in an election contest, to file a bond within 20 days after the official canvass of the votes? (2) Is the filing of such bond within 20 days after the votes are canvassed necessary to confer jurisdiction on the court to hear and determine the contest?

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Section 2070 provides: "The contestant shall file in the proper court, within 20 days after the votes are canvassed, a complaint, setting forth the name of the contestant, and that he is an elector competent to contest such election, the name of the incumbent, the office contested, the time of the election, and the particular causes of contest, which complaint shall be verified by the affidavit of the contestant that the causes set forth are true as he verily believes. The contestant must also file a bond, with security to be approved by the clerk of the court or county judge, as the case may be, conditioned to pay all costs in case the election be confirmed, the complaint dismissed, or the prosecution fail."

Contestant argues that the statute, properly construed, does not fix any time within which the bond for costs must be filed, and, inferentially, that the provision relating to the filing of such a bond is directory only; that the giving of a bond is intended for the benefit of incumbent, and that none need be filed unless demanded by him. Contestant cites *Nicholls v. Barrick*, 27 Colo. 432, as sustaining his position. There is language in the opinion apparently supporting this position, but a careful examination of the case shows that such language is dictum. In that case, a bond had been given within the prescribed time, but it did not comply with the statutory requirements. Its sufficiency was not attacked until after issue had been joined. The court held the motion to dismiss, because contestant had failed to file the bond provided by law, was in the nature of a plea in abatement, which could not be interposed after answering to the merits. The case is therefore not in point.

1. The statutory provision, "the contestant must also file a bond," is in form, and is clearly intended to be, mandatory. The question is, within what time it must be filed. The purpose of the legislature was to protect the incumbent and make contestant liable for all costs. To effect its purpose fully, the bond should be given before any substantial part of the costs has been incurred.

The word "also," as used in the statute, is significant and has a definite meaning. Some of the definitions given the word by lexicographers are: Too; in addition; likewise; in like manner. Had the word been used in the sense of "too," or "in addition," it would be mere surplusage; but, used in the sense of "likewise," or "in like manner," it makes it clear that the bond should be filed in the same manner as the complaint, *i. e.*, "shall file in the proper court, within 20 days after the votes are canvassed, a bond," etc. The statute has the same meaning as if it read: "The contestant shall file in the proper court, within 20 days after the votes are canvassed, a complaint * * * and must in like manner file a bond with security." A like view is expressed in *Howell v. Commonwealth*, 97 Pa. St. 332, wherein the supreme court of Pennsylvania construes an ordinance containing similar language. Section 2070, properly construed, requires the bond for costs, therein provided, to be filed within 20 days after the votes are canvassed.

2, 3. Is the filing of the bond for costs within 20 days after the votes are canvassed necessary to give the court jurisdiction to hear and determine the contest on its merits? Contestant insists that it is not, for various reasons which will now be considered. He calls attention to section 2075, Comp. St. 1922, which provides that, in election contests, the proceedings shall be assimilated to those in actions, and cites the case of *Kelso v. Wright*, 110 Ia. 560, in which, under an identical statutory provision, the court held, where an incumbent sets up in his answer counter-charges against a contestant, that he is not required to give bond. The Iowa statute, like our own, requires contestant to give a bond, but there is no such statutory requirement concerning the incumbent. The case seems to have no bearing on the question under consideration.

Contestant further argues, since this court has held that the giving of a cost bond under statutory requirement, that nonresident plaintiffs and companies suing in a

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partnership name shall furnish security for costs, is not jurisdictional, that therefore this court should hold that the giving of a cost bond in election contest proceedings is not jurisdictional. It must be borne in mind, however, that those statutory provisions have reference to actions in the proper sense of the word, and not to special proceedings. The rule is quite generally recognized that, in special proceedings, statutory requirements must be strictly complied with. Where a new remedy is created by statute, all the conditions prescribed for its exercise must be strictly observed. The legislature, in conferring the right of a candidate to contest the election of his rival, may impose such conditions as it deems proper. That the right to contest is a special proceeding and that the prescribed procedure and conditions must be strictly followed is generally recognized by the authorities. The following authorities support the views herein expressed: *Ogburn v. Elmore*, 123 Ga. 677; *Dorsey v. Barry*, 24 Cal. 449; *Whitney v. Board of Delegates*, 14 Cal. 503; *Saunders v. Haynes*, 13 Cal. 145; *Pearson v. Alverson*, 160 Ala. 265; *Bowen v. Holcombe*, 204 Ala. 549; *Wilson v. Duncan*, 114 Ala. 659; *Gillespie v. Dion*, 18 Mont. 183, 33 L. R. A. 703; *Wilkinson v. La Combe*, 59 Mont. 518; *Moritz's Contested Election*, 256 Pa. St. 537; *Watkins v. Forkner*, 50 Ind. App. 35; *Murtha v. Howard*, 20 S. Dak. 152.

Both reason and the authorities sustain the view that the county court of Lancaster county was without jurisdiction to hear and determine the election contest on its merits because contestant did not file a bond, with security for costs, within 20 days after the canvass of the votes.

It follows that the motion to dismiss the appeal was properly sustained and the judgment dismissing the appeal was properly entered.

AFFIRMED.

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STATE, EX REL. FRED FUNKE ET AL., RELATORS, V. LANCASTER COUNTY ET AL., RESPONDENTS.

FILED JULY 13, 1923. No. 23158

1. **Highways:** PAVING: "PROPORTION." The word "proportion" as used in the second paragraph of section 2625, Comp. St. 1922, means or signifies part, or portion.
2. **Mandamus:** PAVING: ASSESSMENTS: CORRECTION OF ERRORS. Mandamus is not a proper remedy to obtain redress from errors in making assessments for special benefits by a board of equalization, when the statute affords an adequate legal remedy.

Original proceeding in mandamus to compel respondents to relevy special assessments for paving roads. *Writ denied.*

Peterson & Devoe, for relators.

Charles E. Matson and Hainer & Flansburg, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN, DAY and GOOD, JJ., BUTTON, District Judge.

PER CURIAM.

In this, an original action in this court, the relator, the owner of land in improvement district No. 38, in Lancaster county, Nebraska, on behalf of himself and others similarly situated, brings this action against Lancaster county and the county commissioners of said county, praying for a writ of mandamus to compel the county commissioners of said county to give notice, as provided by law, and thereupon to reconvene as a board of equalization and relevy special assessments on all of the property in said district, in accordance with the net special benefits to such property, and to allow damages to any such property by reason of the improvement made, as provided by law. To the petition the respondents have interposed a general demurrer. The issue for determination is the sufficiency of the averments of the petition to entitle relator to the relief sought.

Besides the necessary formal allegations, relator alleges that the county board did not, in the resolution creating the district designate and fix the proportion of

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the total cost of such work and improvement that would be paid out of the county paving fund, as required by statute, but arbitrarily fixed the amount which should be paid out of the county paving fund at \$10,000 per mile, but which should not exceed one-half the total cost per mile; and that the board of equalization thereafter levied assessments upon the property within the district for the total cost of said improvement, less \$10,000 per mile, without any reference to proportional benefits and proportional expenditures as between the county and property owners within the district, and without reference to the excess of such cost over the estimate fixed by the county surveyor; that said estimates of the total cost of the improvement ranged from \$178,779.23 to \$257,970, and that the total cost of the construction was approximately \$300,000; that relator owned 77 acres of land within the district which was assessed for benefits at the sum of \$10,175.88, being six times the value of the special benefits accruing from the improvement.

Other irregularities in the proceedings are alleged, but apparently are not relied upon, as they are not discussed in the briefs, and they will not be considered in this opinion. Relator claims that by reason of the irregularities the board of equalization was without jurisdiction to make the assessments for benefits conferred upon the properties within the district by reason of the construction of the improvement.

The question presented for determination depends on the proper construction to be placed upon section 2625, Comp. St. 1922. Said section, *inter alia*, provides: "Such districts shall be created by resolution of the county board, and said board shall in said resolution designate and fix the proportion of the total cost of such work and improvements which shall be paid out of said county paving fund which proportion shall in each case be not more than one-half the total cost, and in fixing such proportion of cost said board shall use its discretion and judgment, taking into consideration the whole nature

and value of the territory of the district and the benefits to be derived thereby from such improvement. To pay the remaining cost of such work and improvements said board shall levy special assessments upon all such lots, tracts and parcels of land, or portions thereof in such district in proportion to benefits from such improvements."

It will not be contended that assessments in excess of special benefits derived from the improvement could be lawfully levied against the property within the district. Relator concedes, and we think it reasonably clear from a consideration of the entire statute, that it is intended that assessments shall not exceed the benefits accruing from the construction of the improvement. Relator contends, however, that the part of section 2625 quoted above requires the county board to take into account, not only special benefits, but also the public benefits to be derived from the improvement, in fixing the proportion of the total cost of construction which shall be paid out of the county paving fund; that the county board erred in fixing an arbitrary sum which should be paid out of the paving fund; that, instead, it should have required a certain percentage of the total cost of construction to be paid from the paving fund, and that the board, in fixing the sum of \$10,000 a mile, was not following either the spirit or letter of the statute, and its action in that respect worked a grievous wrong to the property owners of the district, in that the balance of the cost of construction over \$10,000 a mile was, in fact, assessed against the property within the district.

Relator insists that it was the intention of the legislature that the board of county commissioners should consider and determine, at the time of creating the district, the relative benefits to the public at large, on the one hand, and the benefits to the property of the district, on the other, that would accrue from the construction of the improvement, and that it should fix the ratio of one to the other, or fix the percentage of the total cost that

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would be paid from the county paving fund, which would automatically fix the percentage of the cost that the property owners would pay; that the question of fixing this ratio was not open to the board of equalization, and that, if the county board did not have in mind some ratio when it fixed \$10,000 a mile as the proportion of cost to be paid from the paving fund, then the proceedings are void, and, if it did have in mind some ratio or percentage of the cost which the county paving fund should pay, then such ratio or percentage must be followed by the board of equalization in making the assessments for benefits to the several tracts and parcels of land in the district; and he assumes that the ratio the county board had in mind was that existing between \$10,000 a mile and the estimated cost per mile, and that, since the final total cost is greatly in excess of the estimated cost, such excess of cost over the estimate should be apportioned to the paving fund and the property in the district, in the ratio existing between \$10,000 a mile and the estimated cost per mile. Relator contends that he is entitled to the writ; regardless of whether the board of county commissioners had in mind a definite percentage of cost which the paving fund should pay. The argument is ingenious, but not convincing. If, as contended by the relator, the failure of the county commissioners to fix a definite percentage of the cost which should be paid from the paving fund would render the proceedings void, then it would follow that the board of equalization would not be authorized to make any assessment for benefits, and no writ could issue to compel it to reconvene and relevy assessments, when it had no authority to make such assessments. Relator's suggestion, that the county board, in designating \$10,000 a mile as the proportion of cost to be paid from the county paving fund, fixed the amount with reference to the estimated cost per mile, is untenable for the reason that the statute requires the proportion of cost payable from the paving fund to be fixed in the resolution creating the district, while the estimate

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of cost of the improvement cannot be made until a later date.

1. The final solution rests on the meaning of the word "proportion," as used in that part of section 2625, above quoted. Among other definitions of the word "proportion," given by Webster's New International Dictionary are the following: "The relation of one portion to another, or to the whole, or of one thing to another, as respects magnitude, quantity, or degree." "The portion one receives when a whole is distributed by a rule or principle." "A share." Among the definitions given by the Century Dictionary are: "The relation of one part to another or to the whole with respect to magnitude." "Just or proper share; in general, portion."

In determining the meaning that should be given the word as used, it is proper to consider the situation and conditions under which the county board must act in creating an improvement district. At that time, the board has accurate knowledge of the amount available in the paving fund and may know approximately the amount that can be raised by any levy that has been made for the fund, but it cannot, at the time the district is created, have even approximate knowledge of the cost of the improvement, for no estimate of cost has then been made and the kind of paving has not been determined, and the power to determine the kind of paving to be used then rests in the property owners, and not in the county board. It is well known that one kind of paving may cost twice as much as another. The county board could not, in the nature of things, if it designated a percentage of the cost payable from the paving fund, know whether there would be sufficient for the purpose, unless it should fix a very small percentage as the share the paving fund should bear. It will not be presumed that the legislature intended to impose on the county commissioners an impossible condition. The board could intelligently act in the premises by fixing a specific sum that the paving fund should contribute to the whole im-

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provement, or a specific amount per mile, but could not act in that respect if a percentage of cost was fixed. Reason dictates that the proper meaning to be given the word, as used in the statute, is, "share, part or portion." That the legislature used the word "proportion" in the sense of "part" is indicated by the following language in the first proviso in said section 2625: "No such work and improvements shall be finally ordered or constructed unless a petition shall be signed by the owners of a majority of the property chargeable with the cost of the improvement or *part* thereof." The word "part" has reference to the cost and is used in the same sense that the word "proportion" is used in the earlier part of the section. With this construction adopted, the board of equalization was required, then, to levy the remaining amount of the cost, over and above \$10,000 a mile, against the property within the district, but in no event to exceed the benefits conferred by the improvement.

2. Relator has alleged that the amount assessed against his property is six times the benefits derived from the improvement. If he was wronged by an assessment in excess of benefits, the statute afforded him an adequate remedy which he should have pursued, but mandamus is not a proper remedy to obtain redress from errors in making assessments for special benefits by a board of equalization, when the statute affords an adequate legal remedy. Comp. St. 1922, sec. 9225; *State v. Drexel*, 75 Neb. 751.

The allegations of the petition are insufficient to justify the issuance of the writ, and it is accordingly denied.

WRIT DENIED.

DEAN, J., dissenting separately.

I adhere to the views expressed by me in my dissenting opinion in the former case of *Brown Real Estate Co. v. Lancaster County*, 108 Neb. 514, so far as applicable here in respect of exorbitant taxation. The *Brown* case involved the same paving district which is

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under consideration here and in that case two judges besides the writer dissented. As shown in that case, the paved highway is $5\frac{3}{4}$ miles in length and the total cost approximates \$300,000. It is known as the "Penitentiary-Insane Hospital Loop."

This is an original action in mandamus brought in this court for relief from the imposition of a special assessment for paving purposes which is so grossly excessive as to be confiscatory. Relators allege that they own 77 acres of land in the paving district which is assessed for \$10,175.88 for paving purposes, and that the special assessment so made is six times the value of the accruing special benefits. The case coming on to be heard on the demurrer of respondents, the pleaded facts are therefore admitted. The demurrer was sustained and the writ was denied.

It appears that relators went before the board June 20, 1922, and demanded that it reconvene as a board of equalization under section 3, ch. 200, Laws 1915 (Comp. St. 1922, sec. 2627) and relevy special assessments on all the property in the district, not exceeding special benefits. The act provides:

"In cases of omission, mistake, defect, or any other irregularity in the proceedings on any special assessment said board, sitting as a board of equalization, upon giving notice, as provided in the first instance for levying assessments, shall have power to correct such mistake, omission, defect or irregularity, and levy or relevy, as the case may be, a special assessment on any or all property in the district, in accordance with the net special benefits to the property on account of such improvement, and may also make allowance or reallowance, as the case may be, of damages to any such property by reason of such improvement."

So that it plainly appears that the board had legislative authority and was clothed with jurisdiction to remedy an "omission, mistake, defect, or any other irregularity" in its former proceedings. However, the

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board arbitrarily refused to comply with relators' lawful demand. Upon discovery by the board of the havoc which had been wrought under its mistaken application of the law, it seems that under the statute it should have complied with relators' reasonable request.

In view of the record I do not find it necessary to discuss all of the facts which are stressed in the opinion of the majority, but have devoted my attention to some other features suggested by the record and such law as appears to be applicable thereto. The act appears to be so involved and so lacking in coherency and clearness of expression that it is incapable of intelligent enforcement. That it is unworkable, and consequently void, is established by what the board did under the act, rather than by what counsel now say the law intended that the board should have done. It need scarcely be observed that the board is not vested with authority, nor is the court, to add anything to or to take anything away from a legislative act by strained construction or otherwise. A legislative act which is meaningless must so remain until remedied by a future legislature.

This excerpt from respondents' brief fairly sums up the main points of the argument upon which they rely:

"Even though the assessment is in excess of the benefits; or in excess of statutory provisions; or is disproportionate to benefits; or where the improvement is of no benefit to the property; or even where the improvement has been injurious to the property; or where the assessment is in excess of the cost of the improvement; or where the assessment was made without regard to benefit; or where extra charges are included in the assessment; or where there has been an exclusion of property benefited from the district; or where the improvement was of a general and of no special character and creates no special benefit, he is foreclosed if he does not appear before the board and appeal from its decision."

In view of the practical confiscation of relators' property which by the demurrer is admitted to be true, and in

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view of the provision for a relevy in the act above cited, respondents' argument lacks much of being persuasive. Counsel go far and ask much. The topmost peak of technicality is touched by their contention. But technicalities cannot outweigh equities. If counsel's argument is sound, the relators, and all in like situation, are indeed in a pitiable plight.

The rule which respondents invoke is merciless in its technical severity. But relators come with clean hands. They offer to do equity. They do not seek to destroy nor to invalidate the paving district. They say they are ready to pay the part of the paving cost which is properly chargeable against their property. All they ask is that the board be compelled to reconvene and perform a legal duty which it has not yet performed, and which under the law, if the court holds it valid, it is bound to perform. Their only protest is that they shall not be despoiled of their lands. The facts present a situation akin to forfeiture, which courts of equity abhor and from which equity unhesitatingly grants relief when in harmony with equitable principles. Relators would not gain anything but that which is their lawful due and the county would not lose anything to which it is lawfully entitled if the relief which relators seek were granted. They do not ask that the board be compelled to do anything more than it should be required to do under the plainest provisions of equity. In the case before us there is an entire absence of bad faith, or deceit, or fraud, or any other like compelling circumstance which should tend to prevent the granting of relators' prayer. Substantial grounds appear for equitable relief and should be applied to the end that so grievous a wrong may be righted. In a case where the scales are evenly balanced and a technical rule is to be invoked, let it be invoked on the side of justice, and not on the side of oppression. In this case the equities are clearly on the side of relators, and a rule should therefore be applied which would relieve from an injustice, rather than one which would impose an in-

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justice. A governing body should set a good example.

It is common knowledge that judicial notice is a part of the equipment of the legal mind. The court is supposed to bring to the consideration of every case a knowledge of things which all persons are supposed to know, and when, under the circumstances disclosed by this record, a direct appeal for relief is made to this court in a case where a person is about to be despoiled of his property without due process, its hand should be raised to stay impending disaster. Clearly the right to be heard should not be denied. The law was made for man and not man for the law, and when by technical interpretation it fails to apply the principle of even-handed justice in the affairs of men its power for good will depart, and, if the law so fails of its purpose, respect for it will be lost. In every civilized society the law should be permitted to grow and expand with the growth of the race and to keep step with its normal needs.

The normal development of law as applied to the relations of men is not a new subject. This observation has been attributed to Aristotle:

"When the law speaks universally, and something happens which is not according to the common course of events, it is right that the law should be modified in its application to that particular case, as the lawgiver himself would have done, if the case had been presented to his mind. Accordingly, the equitable man is he who does not push the law to its extreme, but, having legal justice on his side, is disposed to make allowances." 9 *Encyclopedia Britannica* (11th ed.) p. 726.

It is elementary that the title to an act is that which conveys to the members of the legislature and to the world generally its contents. It is said that some of the ruling despots of a period not so very long ago, as history is reckoned, formed the habit of writing the laws of their country in small print on placards which were placed at so great a height that they could not be read by the people. When an unsuspecting subject was charged with violating a law, about which he knew nothing,

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oftentimes, whether guilty or innocent, he was apprehended, tried and punished in his person or deprived of his property, as the terms of the law might warrant. And so, the tyrants said, the law was vindicated. But when the people became wiser and demanded that the laws be written so that they might be read by all persons, it was discovered that even under the new system drastic provisions for the deprivation of life, liberty or property, for inconsequential acts were frequently hidden away and surreptitiously concealed in an avalanche of written words. Subsequently and after a toilsome struggle, and to prevent the repetition of this very thing, demand was made by the people that a title be given to every act, and this demand, upon being granted, in a crude way outlined its contents. At a later period it came to pass that a title to an act became what its name implied, so that now the Bill of Rights of nearly all of the states provides that a title be given to every act and that its one and only subject be "clearly expressed" therein. This was not done in the act under consideration, though the reason for the rule remains.

The argument is made in relators' brief that they had not heard and did not know of any meeting by the board at which their protesting presence was required. Ordinarily this does not excuse, but there is here substantial basis for their plea in the fact that the title to the act under consideration (Laws 1915, ch. 200) made no reference to a vital subject, herein discussed, which was not embodied in the original act (Laws 1911, ch. 25) and which for the first time appeared in the body of the amendatory act. This was in direct violation of section 14, art. III of the Constitution, which provides:

"No act shall contain more than one subject, and the same shall be clearly expressed in its title."

So that as a matter of law, under the extraordinary facts presented here, relators' plea should be entitled to consideration. Of course, it is not intended that every end and every means that may be necessary to ac-

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comply with the general object of an act should be the subject of a separate act. Cooley, Constitutional Limitations (7th ed.) p. 205. But the title to the act involved here should have had some apt allusion to disclose fully and clearly its contents. Cooley, Constitutional Limitations (7th ed.) pp. 211, 212, 214.

A reference to the title of the amendatory act in question (Laws 1915, ch. 200), which is complete in itself, as hereinafter noted, will disclose that there is not a sentence nor an expression therein directing attention to the fact that such objection to an excessive special assessment as a landowner may have must be submitted to the board of equalization, nor is there any reference in the title to the fact that "no court shall entertain any complaint" which was not theretofore made to the county board of equalization. The title to the act follows:

"An act authorizing county boards of counties containing a city of the first class, having a population of over 40,000 and less than 100,000, to grade, pave, repave or macadamize roads, highways and boulevards outside such cities and other cities and villages in the county, levy a tax to aid in such work, issue bonds and warrants therefor, create improvement districts and levy special assessments upon real estate therein in proportion to benefits for such work, providing for the performance of such work, and repealing sections 2916, 2917, 2918, and 2919 of the Revised Statutes of Nebraska for 1913, and declaring an emergency."

Titles to legislative acts, in almost all states, by reason of constitutional provisions, exclude everything from effect and operation as law which is incorporated in the body of the act, but is not within the purpose indicated by the title. Cooley, Constitutional Limitations (7th ed.) p. 202; *People v. Mahaney*, 13 Mich. 481; *Sun Mutual Ins. Co. v. Mayor*, 8 N. Y. 241.

A very familiar provision of the Bill of Rights is this:

"The right to be heard in all civil cases in the court

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of last resort, by appeal, error, or otherwise, shall not be denied." Const., art. I, sec. 24.

And the relators, upon advice of counsel and in the firm belief that they had a real grievance and were about to be deprived of their property without just compensation therefor, and without due process, under a provision of the fundamental law, appeared in the court of last resort to obtain relief. True, the appearance was not by appeal, nor by error. But they appeared and they believed that the fundamental law meant what it said when it guaranteed that their "right to be heard" in that court should not be denied.

The act by its terms purports to set at naught the effect of section 24, art. I, of the Constitution. Strange as it may seem, the act provides for nothing less. While, of course, it could not achieve that purpose, it appears, when the entire act is considered, to have been the inducement for its passage.

The especially objectionable feature of the act follows, and it is clearly violative of the constitutional provision above referred to:

"No court shall entertain any complaint that such party was authorized to make and did not make to said board when sitting as a board of equalization." Laws 1915, ch. 200, sec. 4 (Comp. St. 1922, sec. 2628).

That provision introduces a new and drastic measure, a stranger to the act which it amends, into the jurisprudence of the state. However, whether it was referred to in the title or omitted therefrom, for the reasons stated, it is an invalid provision. It is not to be presumed that the legislature intended to provide that the property of any person should be taken or damaged for public use without just compensation therefor, nor that it intended to enact a confiscatory act, nor that, after discussion and deliberation, it intended to impose so sweeping a curtailment of the right of the court of last resort to exercise its function in a proper case, even though the party litigant did not first appear before a county board

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to make a protest. Clearly a statute which attempts to place a limitation upon the exercise of the equitable jurisdiction of this court, in violation of a provision of the Bill of Rights, is to that extent void.

In the main opinion it is said:

"Relator has alleged that the amount assessed against his property is six times the benefits derived from the improvement. If he was wronged by an assessment in excess of benefits, the statute afforded him an adequate remedy which he should have pursued."

I do not agree with the conclusion of the majority, nor do I believe that the language of the act is applicable to the pleaded facts here. In my judgment that part of the act which provides for a hearing before the board of equalization for obvious reasons does not afford an adequate legal remedy against a confiscatory special assessment; but, even if it does, the remedy is not exclusive nor is it within the power of the legislature to make it so under the Bill of Rights herein cited.

For relief from an excessive and illegal levy the act, which purports to be complete in itself, as hereinbefore pointed out, undertakes to provide for an appeal, but the terms it fixes are so arbitrary as to be prohibitive. The terms are "inadequate" in the statutory sense. The remedy which the majority opinion says is adequate follows:

"Any party feeling aggrieved by any special assessment, allowance of damages, or proceeding for paving or improving as by this act provided, may pay the said special assessments levied upon the real estate of such party, or such instalments thereof as may be due at any time before the same shall become delinquent, under protest, and with notice in writing to the county treasurer that such party intends to sue to recover the same, which notice shall particularly state the alleged grievance and the grounds therefor; whereupon such party shall have the right to bring a civil action within 60 days thereafter, and not later, to recover so much of the

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special assessments paid as such party shows to be illegal, inequitable and unjust, the costs to follow the judgment or to be apportioned by the court as may seem proper." Laws 1915, ch. 200, sec. 4 (Comp. St. 1922, sec. 2628).

The remedy is not adequate as to the aggrieved person, because it provides that he shall pay the special assessment under protest and afterward try out the question of its legality in the courts. It is obvious that a remedy that is conditioned upon assuming a burden so onerous as paying a large sum of money into the public treasury under protest, there to remain for an indefinite period, awaiting the last and perhaps long delayed word of any court, is not an adequate remedy in this class of cases. From the fact that the statute which provides for the remedy also provides that the costs which follow the judgment will be apportioned by the court as may seem proper seems to indicate that any recovery by the aggrieved person shall be chargeable to the county and be paid out of the county treasury. But, as with other features of the act, much is left to conjecture on this point.

"An adequate remedy is a remedy which is equally beneficial, speedy, and sufficient; not merely a remedy which at some time in the future will bring about a reversal of the judgment * * * complained of * * * but a remedy which will promptly relieve the petitioner from the injurious effects of that judgment, and the acts of the inferior court or tribunal." *State v. Guinotte*, 156 Mo. 513, 50 L. R. A. 787. See also, *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1; *San Jose L. G. I. R. Co. v. San Jose R. Co.*, 156 Fed. 455.

"The existence of a remedy at law does not deprive equity of jurisdiction unless such remedy be adequate. By this is meant that it must be clear, complete, and 'as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.'" 16 Cyc. 41.

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State v. Drexel, 75 Neb. 751, is cited in the majority opinion, but, in view of the circumstances and the law there involved, as compared with the facts and the fundamental law which is applicable here, that case is not authority here.

The questions presented by this record are comparatively new not only to the jurisprudence of this state, but of every state. The introduction of motor propelled vehicles into the already complex relations of life has brought about conditions which were unthought of only a few years ago. The automobile, which is here to stay, is the greatest factor in the business and social life of this age, and by it the fundamental activities of our people have been vastly changed. The building of paved highways in the open country, which is mainly involved here, and the making of paved streets and concrete boulevards in and adjacent to cities, towns and villages are among the principal and most costly of the innovations which have followed closely upon the development of the automobile and of trucks for freighting. And all of this has imposed new and untried duties and burdens upon all the people in their mutual relations everywhere. Small wonder that, in view of the premise, the legislature should inadvertently combine impossible conditions and legislative incongruities in an unworkable act. In passing it may be noted that the same difficulties, and greater, will be encountered when the congress and the legislatures of the several states undertake to regulate the use of the radio and the air lanes in the skies.

It is said by a modern writer that, while courts of equity may not assume jurisdiction which is nonexistent, they may avail themselves of new remedies and unprecedented orders to meet emergencies when based on sound principles which are calculated to afford necessary relief without imposing illegal burdens. 10 R. C. L. 263, sec. 9.

I concede that a long recognized and firmly established rule of law, which does no violence to the

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supreme law, under which rights of persons and of property have grown up and have been developed, is entitled to recognition, even though some hardship may result in its application to the individual case, and this because of the importance of having a settled rather than a vacillating system of law. But that question is not at all involved here, because the conditions under consideration are new and the law which is here involved is a pioneer in its field.

The majority of the court having sustained the act in question, I respectfully submit that, under the admitted facts, the writ should have been allowed and a relevy ordered. The application having been denied, I dissent from the judgment herein rendered.

IN RE ESTATE OF ELIZA M. VANDEVEER.

HARRY B. WOODING, APPELLEE, V. WILLIAM B. WILLIAMS,
APPELLANT.

FILED JULY 13, 1923. No. 22336.

Wills: CONSTRUCTION. When it becomes necessary to construe a will, the entire instrument will be considered, and if, from its language, the intention of the testatrix can be ascertained, such decree will be entered as best effectuates the intention therein expressed.

APPEAL from the district court for Nemaha county:
JOHN B. RAPER, JUDGE. *Affirmed.*

H. A. Lambert, for appellant.

Kelligar & Ferneau, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN and DAY, JJ., BUTTON, District Judge.

MORRISSEY, C. J.

This is an appeal from the judgment of the district court for Nemaha county construing the will of Eliza M. Vandever, formerly Kimberley. November 6, 1893, Eliza M. Kimberley, widow of George G. Kimberley, executed her last will and testament. Subsequently she married Absolem Vandever. She died February 6, 1895. Her will was admitted to probate March 19, 1895.

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The testatrix had no children by either marriage, but while her first husband was still living there was taken into the family a boy, who was never regularly adopted, but was reared by testatrix and her husband; known by the name Kimberley and treated as if he were a son.

The will provided for the payment of debts and funeral expenses, and devised a specific tract of land to testatrix's sister for life, with remainder to the sister's son, Harry B. Wooding. Certain personal property is also given to the sister. No question is raised as to these devises and bequests, but the third paragraph of the will gives rise to this litigation and reads as follows:

"I give, devise and bequeath unto my son George H. Kimberley the east 1/2 south west quarter sec. 33, town 4, range 15, 80 acres, to be used by him during his natural life and in case he should die without legal heirs said 80 acres to revert to Harry B. Wooding or his heirs.

"And whereas there are certain sums of money due me upon notes given by said George H. Kimberly, it is my will that such indebtedness immediately after my death shall be canceled by my executor and I do hereby release the person aforesaid from the payment of all debts due me.

"Furthermore, whereas there is likely to be personal property left over and above the amount necessary to pay my just debts and funeral expenses.

"I therefore give, devise and bequeath from said amount remaining the sum of five hundred (500) dollars to be used for the purpose of building a house on above mentioned 80 acres for said George H. Kimberley. My executor will see that the above wish is fully carried out.

"The above five hundred (500) is not to be used for any other purpose.

"Furthermore I give to George H. Kimberley one team of horses and harness."

Another paragraph provided that George H. Kimberley should have all her farming implements and tools

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if he went upon the farm and used them, but otherwise they should revert to the nephew, Harry B. Wooding. Executors were duly appointed. They paid all debts and claims against the estate and made proper distribution of the property except the \$500 mentioned in the third paragraph of the will. The sum which the executors were authorized to spend in the erection of a house was never so used, but was properly invested, and the principal sum together with the accrued interest are now in the hands of the executors. All other matters connected with the estate having been duly closed, the executors prayed for a decree disposing of this sum and granting them a final discharge from their trust.

After the death of the testatrix, George H. Kimberley was placed in possession of the land, tools, farming implements, and other property, as provided by the will, but he never established his home upon the farm. He soon departed from Nemaha county leaving creditors, one of whom caused an attachment to be levied upon his interest in the land and a judicial sale of his interest was made. George H. Kimberley has not been heard from for many years and is presumed to be dead. It is claimed, however, that, if dead, he left surviving him a wife and child. These matters we regard as unimportant in the disposition of the question presented. By a petition in intervention, appellant, in the county court, set up his ownership of the life estate of Kimberley and also his ownership of the interest of Harry B. Wooding, the remainderman. The petition alleged that immediately upon the death of the testatrix, not only the land, but the sum directed to be spent in the erection of the house became vested in Kimberley, and asked that the court direct the executors to use the fund in their hands to erect a house upon the land. The county court entered a decree as prayed by the intervener, but on appeal to the district court this decree was set aside, and the court found that the \$500 mentioned in the third paragraph of the will was bequeathed for the personal use of

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George H. Kimberley, and that when he abandoned the premises and permitted them to be sold the gift lapsed and became impossible of fulfilment; that the sum in the hands of the executors became intestate estate; ordered distribution accordingly, and dismissed the petition of the intervener.

Appellant earnestly contends that the court erred in finding, as a matter of law, that the sum mentioned was for the personal use and enjoyment of George H. Kimberley; that the bequest lapsed when he abandoned the premises, or that the bequest became intestate estate.

There is no disputed question of fact, and we are left to a consideration of the will as a whole to determine what was in the mind of the testatrix at the time of its execution. At the outset it may be noted that she did not direct the payment of this sum of money to George H. Kimberley that he might erect a house, but the language employed is in the nature of a direction to her executor to retain control and possession of the money until he had spent the same in building a house "for said George H. Kimberley," and there is added the further admonition that the money shall be used for no other purpose. This final admonition certainly does not indicate an intention on the part of testatrix to build a house for the use and benefit of attaching creditors. But the paragraph in the will whereby she gave this foster son the farm, implements and machinery on condition only that he use them upon the farm, and that upon his failure so to do they should go to her nephew, indicates a desire on her part that the young man settle down and make a home upon the farm. The conditions imposed, however, show that she had doubts of his stability of character, and therefore provided for the disposition of the machinery in case it was not used upon the land. The fund was placed with the executor that he might use it in the erection of a house "for said George H. Kimberley." A limitation was placed upon the use of the fund. It was not an unqualified direction to expend

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the money upon the land. It was to be expended only for a definite and specific purpose, and for the use and benefit of George H. Kimberley, and, in the language of the will itself, "not to be used for any other purpose."

By his own conduct Kimberley made it impossible for the executor to use the money for the purpose directed. It will not be doubted that, had some friend pointed out to testatrix when she was executing her will the train of events which subsequently transpired, and had told her that the court would direct this fund paid over to the purchaser of the land at judicial sale, she would at once have denied any intention to have the fund so used. It is the duty of the court to carry out the intention of the testatrix when such intention can be gathered from the instrument. We hold that the district court did not err in holding that the fund in the hands of the executor is intestate estate, and in dismissing the petition of the intervener. The judgment is

AFFIRMED.

HOLMQUIST ELEVATOR COMPANY, APPELLEE, V. OMAHA
ELEVATOR COMPANY ET AL., APPELLANTS.

FILED JULY 13, 1923. No. 22451.

1. **Appeal:** ENTRY OF JUDGMENT WHERE FACTS ADMITTED. After all the testimony in the action had been introduced, the court discharged the jury and entered a judgment for the plaintiff upon the undisputed facts and admissions in the pleadings and in open court. *Held* that this was not prejudicial error, since under the evidence it would have been the duty of the court to direct a verdict for the plaintiff, if the jury had not been discharged.
2. **Sales:** GRAIN EXCHANGES. Sales of grain made upon the floor of the Omaha Grain Exchange by one member of the exchange to another member are governed by the rules of the grain exchange.
3. **Evidence** examined, and *held* to support the findings and judgment of the trial court.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.*

James C. Kinsler and George A. Keyser, for appellants.
Smith, Schall, Howell, Howard & Sheehan, contra.

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Heard before MORRISSEY, C. J., LETTON and DEAN, JJ., BLACKLEDGE and COLBY, District Judges.

LETON, J.

Appellants were found by the trial court to be liable to the Holmquist Elevator Company, appellee, for the value of two cars of corn. A jury was impaneled and evidence taken. At the close of the testimony the court discharged the jury and entered a judgment for the value of the corn in favor of the plaintiff. This action of the court is complained of; but upon the undisputed facts the court had the right to determine the question as one of law. The real controversy is as to whether the conclusion drawn is justified by the undisputed and admitted facts.

On August 3, 1917, the Holmquist Elevator Company received two cars of corn and sold them on the floor of the Omaha Grain Exchange to one William R. Richter, doing business as United States Commission Company, also a dealer on the exchange.

Section 9 of rule VI of the Omaha Grain Exchange, so far as material here, is as follows:

"On all sales of cash grain to go to elevators, mills or warehouses in this market, made on the floor of the exchange, on the 'Call' board, or by private sale, in accordance with the rules and regulations of the exchange, the buyer shall order the grain to the elevator, the ownership of such grain to remain in the seller until the grain is paid for. On such sales payment shall be made by the purchaser before 2 o'clock p. m. of the day following the day on which the grain is unloaded at the elevator. * * * No grain shall be paid for until unloaded, or at the expiration of 144 hours from 2 o'clock p. m. of the date of the sale of the grain."

The custom among dealers upon the Omaha Grain Exchange is that, when a car of grain is consigned to them at Omaha, a bill of lading is sent with a draft attached. As soon as the car arrives the inspection department of the exchange procures a sample of the

grain in the car and fixes the grade. A sale is made, based upon the grade and sample, during the first session of the exchange following the receipt of the sample. After the sale is made the bills of lading are turned over to the buyer for the purpose of procuring the moving of the cars to the elevators or industries for which they have been bought. The payment for the grain in the car is not required until after it is weighed.

On August 3, 1917, the cars were sold to Richter. They were ordered by him to the Omaha Elevator Company to be weighed. Richter became insolvent before the grain was paid for.

The Albers Commission Company answered, alleging that on August 7 and 8, 1917, it bought the two cars from Richter, and received from him the bills of lading for them; that a rule of the Omaha Grain Exchange provides:

"Where a bill of lading is transferred and the party receiving the same issues and delivers to the person surrendering the bill of lading a receipt therefor, stating that the title to the grain covered by said bill of lading shall remain in the party holding said receipt until the same is fully paid for, then the person issuing such receipt is hereby prohibited from accepting or receiving advances on said bill of lading, or negotiating the same, so long as the receipt therefor is outstanding. Where a bill of lading is transferred and receipt issued therefor as above provided, the party transferring the same shall plainly stamp or write across the face of said bill of lading the words: Receipt issued for this bill of lading under rules of Omaha Grain Exchange to (name of holder of receipt)."

That neither of the bills of lading bore any stamp as provided in this rule; that defendant had no notice of any kind that the plaintiff herein claimed any interest in the cars of corn, and that it purchased the same without notice that plaintiff had any such interest; that at the time of the purchase Richter was indebted to de-

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foundant in an amount much greater than the value of the grain bought, and the same was purchased to apply on the account of Ritcher, and the purchase price credited in the regular course of business to him. It denies that the cars were sold on the floor of the exchange, and were known as floor sales.

The evidence establishes that the grain was sold upon the floor of the exchange, and that neither bill of lading bore any stamp showing that a receipt had been issued.

The question to be determined is: Did the Albers Commission Company in fact purchase and pay for the grain without notice of the rights of the plaintiff? As between plaintiff and Ritcher, under section 9, the title remained in plaintiff until after the grain was weighed and paid for. The rule that appellants rely upon, to wit, "Where a bill of lading is transferred and the party receiving the same issues and delivers to the person surrendering the bill of lading a receipt therefor, stating that the title to the grain covered by said bill of lading shall remain in the party holding said receipt until the same is fully paid for," and the fact that such receipt has been given shall be stamped upon each bill of lading, is not mandatory, but only permissive. The seller is not obliged to take a receipt and have the bill of lading stamped, but if he does so he can thereby protect himself from the risk of the sale and transfer of the bills of lading and the grain to an innocent purchaser. The imprinting of such a stamp upon the bills of lading gives actual notice to any person receiving the same that the title to the grain still remains in the original holder of the bill. Without such stamp the bill of lading furnishes no notice to a subsequent purchaser. The stamp not appearing upon either of these bills of lading, they conveyed no notice to the Albers Commission Company that the title had not passed to Richter.

It is not clear from the record when the grain was unloaded; one car seems to have been unloaded on August 13, and the other one afterwards. Richter de-

livered the bills of lading to the Albers Commission Company, one on August 7, and one on August 8. The grain had not been weighed or paid for. Under rule 9, the ownership remained in the seller at that time. The Albers Commission Company was in the habit of dealing with Richter and carried a running account with him. In June, 1917, it loaned to Richter the sum of \$5,000 and took his demand promissory note for the same. At the time the alleged sale was made the open book account of Richter showed that he was indebted to the Albers Commission Company in the sum of \$4,500, but at the same time the company held his demand note of \$5,000 covering the same debt, for which note he had never received credit, and part of the account seems to be a claim for damages. No one testifies as to any conversation which took place at the time of the alleged sale. The note was not delivered to Richter when the bills of lading were transferred. The bookkeeper for the Albers Commission Company testifies that he received two account of sale slips showing the purchase of the corn, and he credited the book account with the market value of the corn on the respective dates. The account of sale slips show that the grain was sold by Richter at a much higher price. At either figure the value of the grain much exceeded the amount due the Albers company, even if the promissory note is not taken into consideration.

It also appears that when Mr. Holmquist spoke to Mr. Albers on August 13, with respect to payment for these cars, Albers said there was a question about it, but he thought they would be willing to settle on the basis of the market. Holmquist told Albers he might be willing to accept either the corn or the value on that day. One car had not been unloaded. "It was understood that we had not been paid for the corn for the reason that it had not been weighed." The next day Albers refused to pay for the cars, saying there had been advances made which he did not know about the day before.

The bills of lading contain no notation of "shippers

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weights," so that there can be no room for doubt that the grain was sold on "Omaha weights."

It is no doubt true, as appellants point out, that the lawful holder of bills of lading, not bearing the stamp showing the grain had not been paid for, could order a railroad company to forward the cars containing it to another market, but we fail to see what bearing this has upon the question here. If the Albers Commission Company was not a *bona fide* purchaser of the grain, under the facts in evidence the title would remain in plaintiff wherever the cars might be.

Upon the undisputed facts, we are convinced that the title did not pass to Richter, that the Albers Commission Company is not an innocent purchaser for value, and, not having paid Richter for the grain, its retention after demand constituted a conversion and it is liable for its value.

The judgment of the district court is

AFFIRMED.

GEORGE W. HOPPERTON V. STATE OF NEBRASKA.

FILED JULY 13, 1923. No. 23226.

1. **Criminal Law:** NEW TRIAL: NEWLY DISCOVERED EVIDENCE. A motion for a new trial in the district court on the ground of newly discovered evidence was properly overruled, when the testimony set forth was merely cumulative and corroborative of other testimony, and its reception would not be likely to change the result. *
2. ———: REQUEST FOR INSTRUCTIONS: PRACTICE. In order to present for review an assignment of error that the court refused to instruct upon one or more propositions of law, it is essential that, if the request was made orally, the page of the record at which the request is shown be pointed out in the brief. Unless the instruction refused concerns such an essential part of the issues that it would constitute prejudicial error to fail to instruct upon the point, "the better rule is that suitable instructions be prepared and submitted to the court, thereby obtaining a ruling thereon, which, if adverse, would constitute a foundation for review." *Curtis v. State*, 97 Neb. 397.

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3. ———: EVIDENCE: REVIEW. In order to preserve for review the alleged error that a tobacco cutter, with which it was alleged that the assault was committed, but which after being introduced in evidence was withdrawn as not having been sufficiently identified, was permitted to remain upon a table in the courtroom in view of the jury during the trial, it is essential that a request should have been made to opposing counsel, or to the trial court, to have the same removed from the view of the jury. Where no such request was made, it is too late to present the point to a reviewing court as prejudicing the defendant's rights.
4. **Assault and Battery:** SUFFICIENCY OF EVIDENCE. Evidence of defendant and witnesses upon his behalf examined, and *held* to support the verdict.

ERROR to the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Samuel L. O'Brien and Allen G. Fisher, for plaintiff in error.

O. S. Spillman, Attorney General, and Lee Basye, contra.

Heard before MORRISSEY, C. J., LETTON and ALDRICH, JJ., BLACKLEDGE and COLBY, District Judges.

LETTON, J.

Plaintiff in error, hereinafter termed Hopperton, was convicted of assault with intent to inflict great bodily injury. He seeks to have this conviction reversed.

Hopperton owns and conducts a pool-hall in Crawford. On the afternoon of August 19, 1922, the complaining witness, Dotson, with one Knott, went into the pool-hall; Knott desiring to purchase some tobacco. Hopperton testified that, after buying the tobacco, Knott and Dotson sat down across the room; that he called Dotson over to the counter, or glass case, behind which he stood; that Dotson crossed the room, some high words passed between the men, Dotson using an opprobrious epithet; that Dotson reached across and tried to strike him, and that he jerked backwards; that he told Dotson to go out; that Dotson threw his hand behind him, and, said the witness, "I guess I must have thrown something at him." Other undisputed testimony is to the effect that a moment later

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Dotson received a violent blow in the face from some instrument, which caused a compound fracture of the maxillary bone, forced his nose to one side, caused a wound both above and below his left eye, and cut his upper lip through to the teeth.

Defendant testifies on cross-examination in part as follows: "Q. Now, you said in your direct examination that after this talk with Dotson, and his attempt to strike you, you kind of forgot everything. Just what do you want the jury to understand by that? A. Well, I got mad. I didn't realize what I was doing at the time. Q. You got mad? A. Yes, sir. Q. And have you any recollection of picking up the tobacco cutter there and striking him with it? A. No, sir; I don't. Q. Are you swearing you didn't do that? A. I don't remember it at all. Q. Do you swear you didn't do it at all? A. I don't remember of it. I wouldn't swear positive I did or didn't, for I don't remember. Q. You might have done it? A. I might have done it."

The evidence of defendant himself and that of witnesses called by him is practically sufficient to establish his guilt of the crime charged, and, when considered in connection with the undisputed testimony on the part of the witnesses for the state, we cannot see how the jury could have done otherwise than find defendant guilty.

A motion for a new trial was filed during the term on the ground of newly discovered evidence. The testimony of the witnesses, as set forth in the application, was mainly to the effect that there had been some hard feelings between the parties before the time of the assault, and that Dotson attempted to assault Hopperton before he took any hostile action toward Dotson. As to both of these matters the testimony was only cumulative and corroborative of other testimony in defendant's behalf, and a new trial was properly refused. Moreover, in our consideration of the evidence we have given little weight to the testimony of the state's witnesses as to the immediate facts, and base our conclusions very largely upon the testimony of

defendant and the witnesses produced in his behalf. Defendant has thus had the full benefit of all that these witnesses might have testified to, had they been present at the trial.

A request for a continuance was made by defendant during the progress of the trial, and the refusal to grant it is assigned as error. The witness desired was unable to attend on account of illness, and his illness had only been ascertained by defendant that day. His testimony had been taken in shorthand at the preliminary examination on behalf of the state and transcribed, and defendant had exercised the privilege of cross-examination at that time. This fact was stated by the court and defendant was given the privilege of reading it if he desired. The state objected to the reading of the transcribed testimony for the reason that the witness was present in the county and subject to subpœna. Upon this objection being made the court offered to continue the case over the term. The objection was then withdrawn, and the testimony at the preliminary was read in behalf of the defendant. We are unable to find any prejudice to the substantial rights of defendant in this.

It is charged that there was misconduct on the part of the county attorney in offering in evidence a tobacco cutter which was not shown to be the implement used, and allowing the same to remain upon the counsel's table during the trial. The tobacco cutter was offered and received in evidence, but upon further examination of the witness producing it, and not being sufficiently identified as the one thrown, it was stricken as evidence upon the motion of defendant. The defendant made no objection at the time of the trial to this exhibit being in view of the jurors or being referred to. It is too late now to raise this objection. No doubt the court would have compelled its removal if the matter had been called to its attention.

The evidence does not support the contention as to other alleged misconduct on the part of the county attorney. Errors are assigned by the giving of instructions

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Nos. 6, 8 and 9, and in refusing certain instructions requested by defendant. The substance of instruction No. 6 is that, if the jury were convinced beyond a reasonable doubt that the defendant assaulted Dotson with a tobacco cutter, and if it further believed beyond a reasonable doubt that the tobacco cutter was a dangerous and deadly weapon, and that the assault was made purposely and maliciously, there is a presumption that he intended the natural and probable consequence of his acts, and they would be justified in finding him guilty. Instructions 8 and 9 are concerned with the right of self-defense. We find nothing erroneous in these instructions as applied to the facts in this case.

It is also assigned that the court erred in refusing to instruct, at the request of defendant, that the defendant had the right to remove disorderly trespassers from his place of business. No such instruction was tendered, and no complaint is made in the motion for a new trial of a refusal to give any such instruction. Furthermore, the brief nowhere points out in the record where any such oral request was ever made.

As to the assignment that the court erred in refusing to instruct, upon the request of defendant, upon the different grades of assault, the record does not show that the defendant ever made such request. If proper instructions of this nature had been tendered, we cannot say but that the court would have given them. Under the facts in this case, the court was under no obligations to volunteer such instruction. We have said that error cannot be predicated upon such refusal without calling the attention of the trial court to the subject, and that the better rule is that suitable instructions be prepared and submitted to the court for a ruling thereon. *Curtis v. State*, 97 Neb. 397.

The real fact is that the defendant is exceedingly fortunate, for if the missile thrown had varied even a slight degree, the defendant might have been on trial for his life instead of for an aggravated assault. We find no

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prejudicial error in the record, and the judgment of the district court is therefore

AFFIRMED.

BROWN REAL ESTATE COMPANY ET AL., APPELLANTS, V.
LANCASTER COUNTY ET AL., APPELLEES.

FILED JULY 13, 1923. No. 23386.

1. **Highways: PAVING: SPECIAL ASSESSMENTS.** The provision in section 2627, Comp. St. 1922, relating to special assessments, that the county board shall by resolution "fix and determine and levy the assessments upon each lot, tract and parcel of land, or portion thereof, in proportion to the net benefits derived by each by reason of such improvement," construed, and *held* to mean, in proportion to such benefits, but not in excess of the special benefits derived from the improvement by each lot or tract.
2. ———: ———: ———. The language of section 2627, Comp. St. 1922, as to the assessment of benefits and the provisions of section 6, art. VIII of the Constitution of Nebraska, by implication limit the amount of assessment for local improvements to the special benefits severally accruing to the lots or parcels of land thereby affected.

APPEAL from the district court for Lancaster county:
WILLIAM M. MORNING. JUDGE. *Affirmed.*

Field, Ricketts & Ricketts, for appellants.

Hainer & Flansbury, Charles E. Matson, Max G. Towle, L. R. Doyle, C. J. Campbell and H. R. Ankeny, *contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE, ALDRICH, DEAN and DAY, JJ., BLACKLEDGE and COLBY, District Judges.

LETTON, J.

The purpose of this action is to enjoin the county treasurer of Lancaster county from selling any of the properties of the plaintiffs in paving district No. 38 for non-payment of special assessments; to declare that section 1, ch. 152, Laws 1917, section 2625, Comp. St. 1922, requiring that the costs of a public improvement made under said act, less the aid that shall be voted by the

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county, shall be levied as special assessments upon the property of the district is void, being in conflict with the Constitution of the United States, and with section 21, art. I of the Constitution of the state of Nebraska; and that the respective titles of plaintiffs to property owned by them respectively in the paving district be quieted as against such special assessments.

The petition sets forth a resolution by the board of county commissioners of Lancaster county, creating paving district No. 38. This resolution designates the proportion of the total cost of the improvement to be paid out of the county paving fund at \$10,000 per mile, "which proportion shall not be more than one-half the total cost per mile." The resolution also provided that the entire cost of the improvement, "less the above designated county aid and less any state and federal aid which may hereafter be designated, shall be assessed against the property benefited in said district in proportion to the benefits derived from said improvement not exceeding the actual cost thereof." It is alleged that the improvement was made and accepted; that the county board pretended to sit as a board of equalization, passed a resolution finding that all the property within the district had received net blanket benefits in the amount of \$244,222.60; that the recitals in the resolution as to the assessment of benefits to the properties in the district being just and equitable were untrue, because the county board did not visit and identify the respective properties, nor take any evidence; that the board was governed by section 1, ch. 152, Laws 1917, section 2625, Comp. St. 1922; that this section fixes an arbitrary proportion of the cost of the improvement that should be levied on the property of the district, and is unconstitutional and void. Demurrers to the petition were sustained by the court. From a judgment dismissing the action plaintiffs appeal.

The argument, both oral and in the printed briefs, was devoted practically to one proposition, which is, the

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unconstitutionality of the second and third paragraphs of section 2625, Comp. St. 1922, which is part of the act relating to paving county roads. The contention is that, after the proportion which the county shall pay has been designated, the provision that "to pay the remaining cost of such work and improvements said board shall levy special assessments upon all such lots, tracts and parcels of land, or portions thereof in such district in proportion to benefits from such improvements" is void, as allowing or commanding an assessment, which may, and in this case does, exceed the benefits derived.

It is said: "This levy and distribution of the special assessment was intended to comply with the letter of the statute. The language of the statute seems clear, free from doubt and ambiguity. It cannot be construed to convey a different meaning or method of levy without violation to the express letter of the statute." On the other hand, the position of defendants is that the words "in proportion to benefits from such improvements" must be read in connection with the fundamental principle that, under the Constitution, special assessments must not exceed the special benefits which accrue to the property by reason of the improvements.

The vital question is, whether the facts alleged establish that an arbitrary sum was levied on the property without any reference to the special benefits derived from the improvement. The record of the board of equalization, set forth as an exhibit to the petition, recites, among other things, that the board had before it for inspection a map and plat of the district prepared by the county surveyor, showing the location of the improvement and the tracts, lots and parcels of land or portions thereof included in the district, and a tentative levy of assessments and allowance of damages with respect to each. It is further recited that the board has taken into account the special benefits derived and damages sustained by reason of the improvement to each in proportion to the net benefits derived by each;

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that the board had received written objections and protests to the tentative assessments by certain property owners, naming them, and had "taken evidence in support of the same and on behalf of all other property owners relative to the proportion of the net benefits derived by each by reason of such action." It therefore overruled the objections, found that the net benefits to all the property in the district was \$244,222.60, that the assessments on each lot and tract are legal, just and equitable, and ordered their collection.

In determining the meaning and intention of the legislature, we may consider the whole enactment. In addition to the provision in section 2625, that the special assessments shall be made "in proportion to benefits," section 2627, part of the same original act, provides that, in case of a reassessment, it shall be the duty of the board to levy, or relevy, a special assessment on the property in the district in "accordance with the net special benefits" to the property. Both of these clauses evidently are intended to have the same meaning. It would be absurd to say that an original levy could exceed special benefits, and a re-levy for the same purpose could only be "in accordance with" special benefits. A levy in accordance with special benefits could not exceed them. If it did it would not be in "agreement," "conformity," or "harmony" with them, to substitute synonyms of "accordance" given in the Standard Dictionary.

Again, long before the passage of this act, this court had held that assessments made in excess of special benefits are void. *Hanscom v. City of Omaha*, 11 Neb. 37; *Cain v. City of Omaha*, 42 Neb. 120. And the supreme court of the United States in *Norwood v. Baker*, 172 U. S. 269, had so decided. We must consider that the legislature enacted this statute having knowledge of the law thus declared and of the limitations of the Constitution. We think there can be no question but that the legislature, in using the words "in proportion to special benefits" and "in accordance with the net special benefits," excluded the idea

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that the assessment might be in excess of the special benefits derived from the improvement.

In *Smith v. City of Omaha*, 49 Neb. 883, a very similar question arose. The language of an ordinance of the city of Omaha then considered was that the damages for change of the grade of streets "be, and the same is hereby, levied according to special benefits by reason of said change of grade upon the following lots." The statute, which is set forth in the opinion, gave the mayor and council power "to assess the damages * * * upon the lots and lands benefited." The court held: "Both section 6, article IX, Constitution 1875, and the charter of the city of Omaha by implication limit the amount of assessment for local improvements to the special benefits severally accruing to the lots or parcels of land thereby affected." This decision is a clear precedent against plaintiffs' contention, and is probably sufficient upon which to base the decision.

But other courts have taken a like view. A Massachusetts statute, providing for the construction of sewers or drains, provided that the board of commissioners "shall assess upon the several estates specially benefited by such sewer or drain, a proportional part of the cost thereof, not in excess of the amount of four dollars per lineal foot." The court said: "That clause confines the assessment in terms to the estates specially benefited and limits it to a proportional part of the cost, not exceeding four dollars per lineal foot, but does not limit it in clear terms to the special benefit received. We are of the opinion, however, that the word 'proportional' as here used must be taken to mean proportional to the special benefit received." *Hall v. Street Commissioners*, 177 Mass. 434.

In *Cheney v. City of Beverly*, 188 Mass. 81, the court said: "The statute authorizes an assessment at 'a fixed uniform rate, * * * according to the frontage of such estates on any street or way where a sewer is constructed, or according to the area of such estates within a fixed depth from such street or way, or according to both such frontage and area.'" The court said: "We are of opinion that

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the Pub. St. c. 50, sec. 7 (R. L. c. 49, sec. 5), taken in connection with other parts of the statute, shows an intention that the assessment shall be proportional, and while it determines that the specified methods may be adopted as giving assessments which are proportional under the usual conditions, it was not intended to authorize an assessment of an amount which exceeds the special benefit. We are of opinion that the statute should be construed as if it contained the words, 'but in no case shall an assessment be made that exceeds the special benefit received by the estate assessed.' "

In *Tyler v. City of St. Louis*, 56 Mo. 60, the charter provided that property owners adjoining lands condemned for streets should be assessed "in proportion that such property may be respectively benefited by the proposed improvement." An instruction was given that the jury might find a verdict for an amount in excess of the actual benefits derived by the property. The judgment was reversed, the court construing this language to mean that the assessment should be in proportion to the amount that the property was respectively benefited, and could not exceed the special benefits. *Hughes v. Farnsworth*, 137 Minn. 295.

Appellants argue that the construction contended for by the defendants would leave a large portion of the costs and expenses of the improvement unprovided for, that such a construction renders the statute unworkable, and that it must be plain that the legislature did not intend such unreasonable construction. This argument assumes the existence of such a fact. The petition does not so allege. Probably the legislature had in mind that before a county board would order such an improvement to be made it would take into consideration whether there was a reasonable probability that the special benefits to be derived by the property affected would equal or exceed the cost of the improvement, and would refuse to order that it be made unless the board could see its way clear to provide for payment for the work. It may

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be noted that the legislature at its last session limited the amount that may be levied upon outlying property in such a district. Laws 1923, ch. 45.

Other questions which might be raised upon the demurrer have been settled in the following cases: *Brown Real Estate Co. v. Lancaster County* 108 Neb. 514; *State v. Lancaster county*, ante, p. 635; *Broghamer v. City of Chadron*, 107 Neb. 532; *Weilage v. Crete*, ante, p. 544.

AFFIRMED.

DEAN, J., dissenting separately.

So far as applicable here, my dissent in the case entitled *State v. Lancaster County*, ante, p. 635, may be considered as a dissent here. Both cases involve the same paving district. This case was brought here on appeal from the district court. Defendants demurred to plaintiffs' petition. The demurrer was sustained and plaintiffs electing to stand on their demurrer appealed to this court.

In plaintiffs' petition it is alleged that the special assessments, which aggregate approximately \$100 an acre, are 10 times greater than the benefits which accrue to the property. The demurrer in effect admits the pleaded facts. Plaintiffs insist that the act is unconstitutional and therefore void. Nevertheless they express in the brief an entire willingness to pay a reasonable assessment for the improvement as made, if the court should "find the statute in question is a valid statute." Should the court so find, they request that the defendants be ordered to give notice and reconvene and reassess the property of the district under the prayer of the plaintiffs "for alternate or other and different relief." It is but natural that they should protest their unwillingness to have their property taken without due process or, as they observe, "have it confiscated to provide what is largely a pleasure drive for the benefit of the people of the city of Lincoln."

In the belief that the prayer of plaintiffs should have

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been granted, I respectfully dissent from the opinion of the majority.

WILLIAM B. ENGDahl, APPELLANT, v. JAY LAVERTY ET AL., APPELLEES.

FILED JULY 13, 1923. No. 22473.

1. **Parties:** INTERVENERS. The statute permitting intervention before trial as a matter of right does not prevent a court of equity, in the exercise of discretion in furtherance of justice, from allowing intervention after the trial has begun.
2. ———: FORECLOSURE: INTERVENTION AFTER DECREE. While leave to intervene after the entry of a final decree is not allowable as a matter of right and is generally denied, a court of equity, subsequent to the entry of an unexecuted decree foreclosing a mortgage, may, in the exercise of discretion in furtherance of justice, permit the owner of the mortgaged land to intervene in the foreclosure suit, upon proper pleas and sufficient proof, disclosing that he had good reasons for not appearing earlier, that he was deprived of his title without consideration by means of fraud, and that plaintiff is chargeable with knowledge of the fraud and of intervenor's rights.
3. **Deeds:** CANCELAN. A court of equity may cancel a deed procured from the owner of the land without consideration by means of fraud and may also cancel a mortgage given to secure a debt owing by a subsequent grantee to the mortgagee, if the latter is chargeable with notice of the fraud and of the equitable rights of the person defrauded.
4. **Vendor and Purchaser:** POSSESSION: NOTICE. Possession of land is notice to the world of the possessor's interests therein.
5. ———: ———: ———. Possession of land by a tenant is not only notice to the world of his rights as lessee, but is notice of other interests of which inquiry would elicit knowledge.

APPEAL from the district court for Cherry county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

A. H. Murdock, for appellant.

Sullivan, Squires & Johnson, contra.

Heard before LETTON, ROSE, DAY and ALDRICH, JJ.,
REDICK, District Judge.

ROSE, J.

This litigation was begun by the filing of a petition to foreclose a mortgage on a tract of land in Cherry county. The mortgage was given to secure the payment of a note for \$4,000, dated August 5, 1912, and due August 1, 1913. William B. Engdahl was payee and mortgagee. He was plaintiff in the foreclosure suit. The makers of the note were Lavery Brothers, by Jay Lavery; "Lavery Brothers" being the name of a corporation of which Jay Lavery was an officer. The mortgagors were Jay Lavery and wife, defendants. There were other defendants whom plaintiff alleged claimed some interest in the land described in the mortgage. The suit was begun June 17, 1918. There was no defense by any defendant. October 1, 1919, the district court found the amount due plaintiff on the note and mortgage to be \$6,796.66, and entered a decree of foreclosure. October 18, 1919, before the decree was executed, William E. Gregory was allowed to intervene as a party defendant. He filed on that date an answer and a cross-petition, containing pleas that he is sole owner of the land; that he acquired it as a homestead, having made final proof April 19, 1910, and having subsequently received the patent; that Emmett Nutter, one of the defendants, procured from intervener without consideration by means of fraud a warranty deed to the land; that, through mesne conveyances from the fraudulent grantee, Jay Lavery, mortgagor, claimed to have title; that intervener by himself or lessees had been in continuous possession of the land, and that his ownership and rights were known to the grantees in all the transfers and to plaintiff, the mortgagee. Intervener prayed for the cancelation of the mortgage and all conveyances, except the final receipt and patent, and for the quieting of his title. After the district court overruled a motion to strike the pleadings of intervener from the record, plaintiff filed an answer, claiming to be a mortgagee in good faith and putting in issue the facts upon which the equitable rights of intervener were based. Upon a full hearing the

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trial court set aside the decree of foreclosure, canceled the apparent lien of the mortgage and the conveyances through which Jay Lavery acquired title, and quieted the title in intervener. Plaintiff has appealed.

It is first argued that a petition to intervene must be filed before trial, that the right of intervention terminates with the final decree, and that the trial court erred in overruling the motion to strike intervener's pleadings from the record. In this connection reference is made to the statutory right of intervention before trial. Comp. St. 1922, sec. 8552. Intervention under this statute is a matter of right, but does not prevent a court of equity in the interests of justice from allowing a proper party to intervene after the trial has begun. *State v. Farmers State Bank*, 103 Neb. 194.

Was intervention properly allowed 17 days after entry of the unexecuted decree of foreclosure? Leave to intervene after the entry of a final decree is not allowable as a matter of right and should seldom be granted, but equity sometimes requires a departure from the general rule. In the light of both reason and precedent it has been said:

"Applications for leave to intervene after entry of a final decree are unusual, and generally have been denied. There are instances, however, where petitions for leave to intervene have been filed and granted after decree." 21 C. J. 345, sec. 346.

The present instance seems to be one for the granting of leave to intervene after entry of the decree of foreclosure. If intervener pleaded the truth, his land was subject to judicial sale to discharge an apparent lien having no foundation in justice or equity but tainted with fraud. In a suit to which he was not a party, a court of equity had ordered the sale of his land at the suit of a mortgagee chargeable with knowledge of his rights and of the fraud perpetrated upon him. The decree of foreclosure had not been executed. Considering plaintiff a mortgagee in good faith, the right of the

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equitable owner to redeem the land still existed. The court had jurisdiction of the decree for the purpose of enforcing it or for setting it aside for fraud upon a proper showing and notice. The land was a subject of equitable action common to both the petition of plaintiff and the cross-petition of intervener. After intervener appeared, the necessary parties were before the court. In an independent suit in equity the facts pleaded would have been sufficient to justify the vacating of the decree. To permit a judicial sale under the decree after the fraud had been called to the attention of the court would tend to lower the purchase price, to complicate the equitable title still further, to increase the costs of litigation, and to embarrass without reason both the real owner and the purchaser. The evidence upon which the trial court acted in sustaining the application to intervene is not in the record and there is nothing to show that it was insufficient. The circumstances pleaded sustain the court of equity, in the exercise of discretion, in permitting the intervention after the entry of the decree. To have done otherwise would have been inequitable. An independent suit by intervener to protect his right was unnecessary.

On the merits of intervention it is argued that the evidence does not sustain the finding that Nutter procured the deed from intervener by fraud. The position thus taken does not seem to be tenable. Without going into details, the more convincing proofs tend to show that Nutter got intervener drunk, pretended to enter into partnership with him to deal in horses, exacted the deed for the purpose of borrowing \$5,000 to be invested as intervener's capital, betrayed his trust, paid no consideration for the deed except \$70, which intervener offers to return, refused to reconvey the title and transferred it to a third person in furtherance of a scheme to swindle intervener out of his land. On the issue of fraud the finding on appeal is the same as that of the trial court.

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Plaintiff argues further, as a reason for reversing the judgment of the lower court, that he lent \$4,000 to Jay Laverty and accepted the mortgage as security on the strength of the latter's title without any notice or knowledge of intervenor's right, that a representative of plaintiff had made an inspection and had found the land vacant, and that the evidence is insufficient to sustain a finding that intervenor had been in continuous possession. It seems to be shown by a fair preponderance of the evidence that intervenor, from the time of establishing his homestead rights, had been in continuous possession of the land either by himself or tenant. Possession of land is notice to the world of the possessor's interests therein. Possession of land by a tenant is not only notice to the world of his rights as lessee, but is notice of other interests of which inquiry would elicit knowledge. *Dengler v. Fowler*, 94 Neb. 621. While a representative of plaintiff testified that, before the making of the loan, he approved the title of mortgagors, visited the premises, found no one in possession and so reported to plaintiff, the better view of the evidence on this issue leads to the conclusion that his inspection and inquiry did not extend far enough to refute the evidence that intervenor at the time, by himself or tenant, was in actual possession as owner. A sufficient inspection of the land, consisting, as it did, of an area equivalent to a section, and a proper inquiry, would have disclosed the possession and equitable rights of intervenor. No error has been found upon consideration of all assignments.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FARMERS BANK OF
PAGE, APPELLEE: FRED CRONK, INTERVENOR, APPELLANT

FILED JULY 13, 1923. No. 23135.

1. **Banks and Banking:** DEPOSITORS' GUARANTY ACT: "DEPOSIT." A customer paid to a state bank approximately \$650 with which the bank was to obtain a liberty bond and war savings stamps

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of the face value of \$500 and \$150 respectively. Subsequently the bank failed and in the usual court proceedings which followed it was shown that four liberty bonds in the denomination of \$500 each had been received by the bank before it failed, but no bond and no war savings stamps were ever delivered to the customer. By leave of court the customer intervened and filed a claim for \$650 praying that it be allowed out of the depositors' guaranty fund. *Held*, that the intervener was not a depositor within the meaning of the depositors' guaranty act; and, also, *held*, that the court did not err in denying claimant's right to have his claim paid from the fund in question.

2. —: "DEPOSIT." Ordinarily a general deposit consists of money which is mingled with other money of a bank, the entire amount forming a single fund from which depositors are paid.

APPEAL from the district court for Holt county:
ROBERT R. DICKSON, JUDGE. *Affirmed*.

H. M. Uttley and John A. Harmon, for appellant.

J. A. Donohoe, contra.

Heard before MORRISSEY, C. J., ROSE, DAY and DEAN, JJ., BLACKLEDGE and COLBY, District Judges.

DEAN, J.

On and before January 29, 1921, an action was pending in the district court for Holt county, wherein the state of Nebraska was plaintiff and the Farmers Bank of Page, Nebraska, was defendant. The pending action had to do with the affairs of the defendant bank, which had recently failed, and for which a receiver had theretofore been appointed. January 29, 1921, Fred Cronk, by leave of court, filed a petition of intervention, alleging that he had two valid claims against the bank, aggregating \$650 and accrued interest, as for money deposited therein, and prayed for judgment for that amount with interest at 7 per cent. per annum from November, 1917, to be paid out of the depositors' guaranty fund.

The court decreed that the intervener was a general creditor of the bank, and not a depositor, and rendered judgment in his favor for \$650 with interest at 7 per cent. per annum from November 17, 1919. The judgment, however, expressly provides that intervener, as holder of

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the judgment, is not entitled to share in the depositors' guaranty fund nor to have his claim paid therefrom. From that part of the judgment denying his right to share in the fund in question the intervener has appealed.

It appears that the intervener, Cronk, in November, 1917, subscribed for a \$500 liberty bond. He paid to the defendant bank \$500 and arranged with it to obtain the bond for him. Subsequently, but at different periods, four liberty bonds in the sum of \$500 each were received by the bank from the treasury department at Washington, but a \$500 bond was never delivered to him. He also purchased war savings stamps of the face value of \$150, for which he paid into the bank \$124.50, with the understanding that the stamps were to be obtained by the bank from Washington for him, but none of the stamps were ever delivered by it to the intervener. It is under substantially the foregoing facts that intervener maintains that he is a general depositor.

Section 8024, Comp. St. 1922, provides generally that a guaranty fund shall be provided for the protection of state bank depositors and that such banks shall be subject to certain assessments to raise funds therefor, and section 8025 provides that the assessment shall be made on the average daily deposits.

The statute is so plain that it is not susceptible of strained construction. This court has held that a certificate of deposit issued by a state bank which, by special arrangement with a depositor, drew a bonus of only 1 per cent. above the lawful rate of 5 per cent. interest was not a deposit within the meaning of the act, and that where the bank subsequently fails the certificates so obtained cannot lawfully be paid out of the depositors' guaranty fund. *Iams v. Farmers State Bank*, 101 Neb. 778.

There is no evidence in the record going to show that intervener was a general depositor. Ordinarily a general deposit consists of money which is mingled with other money of a bank, the entire amount forming a single

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fund from which depositors are paid. 7 C. J. 628, sec. 305. It has been held that, where a customer delivered certain liberty bonds to a state bank for safe-keeping and the bank converted the bonds to its own use and afterwards failed, the customer was not entitled to payment from the bank guaranty fund. *Spry v. Hirning*, 191 N. W. (S. Dak.) 833.

We do not think the intervener is a general depositor within the meaning of the depositors' guaranty fund law. In the present case the bank was merely the agent of intervener for the purchase of government securities.

The intervener's theory that he was a depositor and entitled to the protection afforded by the depositors' guaranty fund law is not sustained by the facts or the law. We do not, however, hold that the intervener might not in a proper action present his claim for allowance, if so advised, on the theory that such money as he may have paid to the bank was being held by it as a trust fund.

The judgment of the district court is

AFFIRMED.

MIKE GLARIZIO, APPELLEE, v. JAMES C. DAVIS, APPELLANT.

FILED JULY 13, 1923. No. 22458.

1. **Trial:** QUESTION FOR JURY. Whenever there is evidence of so positive and significant a character as, if uncontradicted, would support a verdict, it is the duty of the trial court to submit the case to the jury, under proper instructions. It is not the function of the court to weigh the evidence for the purpose of saying how the verdict should go.
2. **Master and Servant:** QUESTION FOR JURY. The trial court in this case committed no error prejudicial to defendant in submitting the case to the jury upon the doctrine of "the last clear chance," as applied to the charge of negligence submitted for their consideration.
3. **Damages.** The amount of verdict held, under the circumstances of this case, not so large that a remittitur should be required by this court.

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APPEAL from the district court for Douglas county:
L. B. DAY, JUDGE. *Affirmed.*

J. A. C. Kennedy and Yale C. Holland, for appellant.

James C. Kinsler and Herman Aye, contra.

Heard before MORRISSEY, C. J., LETTON and DEAN, JJ.,
BLACKLEDGE and COLBY, District Judges.

BLACKLEDGE, District Judge.

This is an action to recover for personal injuries sustained by plaintiff, defendant's employee, in the Missouri Pacific yards at Omaha, July 15, 1919. Defendant was engaged and plaintiff employed in interstate commerce, and the case is governed by the provisions of the federal employers' liability act.

The petition states a cause of action which would authorize a recovery under the rule of the last clear chance; it being alleged that, while the plaintiff was engaged in his work in a place of danger, the defendant's employees, who were conducting the movements of the cars in question, saw him in such situation, and in danger of being struck by the cars, but negligently failed to stop the cars or give him any warning. Defendant, in addition to denials, pleads negligence on the part of plaintiff, in that he was an experienced laborer in that occupation, could easily have observed, and in fact did see, the approach of the cars by which he was injured, and assumed the risk of such movements, the same being incident to his employment.

In addition to the argument that the trial court should have instructed a verdict for defendant, the propositions principally relied upon in this appeal involve the application of the doctrines of assumption of risk and last clear chance. The trial court, in submitting the case to the jury, told them as part of instruction No. 1:

"This, then, leaves for your consideration but one question of negligence as to which and upon which the defendant is liable, if at all, namely, the question as to whether the trainmen in charge of said string of cars

saw or reasonably could have seen plaintiff in a place of apparent danger, unaware of his danger, and could have avoided the accident by the exercise of reasonable care, and by the prompt use of the instrumentalities at hand failed and neglected to do so. This is the plaintiff's claim as outlined in the first charge of negligence upon which, and which only, the defendant can be found liable, should you find it liable."

It also instructed, upon the question of assumed risk, to the effect that plaintiff assumed all the ordinary risks and dangers inherent in, or incident to, his employment where the business of defendant was carried on with due care, but did not assume the risk of injury arising from a danger which was the result of negligence of defendant, unless such danger was known to him or was apparent or should in the use of ordinary care have been apparent to him, or to persons of his experience and understanding. Other instructions defined negligence, ordinary care, proximate cause, and covered the matters of contributory and comparative negligence, measure of damage; and withdrew from consideration the question of failure to sound whistle or bell as distinct grounds for a finding of negligence. It further instructed specifically that if the jury should find, as was the contention of the defendant, that plaintiff was injured while sitting in his wheelbarrow near the track, and that he knew the cars were approaching long enough in advance to have enabled him to move to a place of safety, then he had all the notice of the danger that a bell, whistle or other warning would have given him, and the giving of a warning signal was unnecessary.

The final weight to be dropped into the scale, and which, in this case, determines whether the award shall fall to the plaintiff or to the defendant, is the fact of plaintiff's personal location and position at and immediately prior to the infliction of the injury. As to this the theories of the two parties were conflicting and irreconcilable. The yard includes a number of tracks

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extending in a northerly and southerly direction, connected by switches and crossovers, the easternmost known as the main line, the one next to it as the old main line, and, west of that, other tracks designated by name or number.

Plaintiff's duties were to gather up and remove pieces of paper, wood, iron, etc., which in the course of operations were dropped on and between the tracks, so as to keep the premises free from accumulations thereof. In this work he used, as his equipment, a wheelbarrow, broom and shovel. He had been in this employment in this yard five years.

Plaintiff contended that in the performance of his work he had approached from the west and was on the old main line facing southward, stooped over and in the act of edging his barrow over the east rail of this track, when, without warning, he was struck from the rear by the approaching cars. On behalf of defendant it was contended that plaintiff had previously crossed said track, and was seated in his barrow in the space between that track and the main line immediately east of it, facing northward—the direction from which the cars came—and hence must have seen them as they approached. As to the connected acts and details of movement of cars and persons, there is much conflict and confusion of statement, both as between the two sides of the case and as between the witnesses produced by either side themselves. It all happened very quickly. The switchman Downing, who, 25 feet from plaintiff, threw the switch which turned the cars in on this old main line track, says there was possibly 30 seconds from the time he got the signal to throw the switch until he saw plaintiff coming out from under the cars. Irving, who testifies to three different switching movements, says it was possibly 45 seconds or a minute, or less than that, from the first to the last, the last one causing the injury. This witness further states that, in the first of these

movements, plaintiff "was going to reach for something in the wheelbarrow, I judge. He was partly stooped over. I thought he was reaching for his broom or shovel." The engineer says he saw plaintiff during the whole time, and that he was sitting in the barrow east of the track.

There was ample evidence to sustain either theory, and we need not give further consideration to the argument that the case should have been taken from the jury. Whenever there is evidence of so positive and significant a character as, if uncontradicted, would support a verdict, it is the duty of the court to submit the case to the jury, under proper instructions. It is not the function of the court to weigh the evidence for the purpose of seeing how the verdict should go. *Mount Adams & E. P. I. R. Co. v. Lowery*, 74 Fed. 463.

It is urged that plaintiff assumed the risk of injury in this manner. The court, perhaps unnecessarily, submitted that question to the jury. This is true because, as appellant also here urges, the case went to the jury upon the question of the last clear chance. Now, the thing that gives rise to the last chance rule is not an ordinary or incidental risk which may be known and assumed. In the necessary sequence of events we have passed that stage before reaching the place where the last chance doctrine is to be applied. It is a condition of impending and unanticipated danger approaching one who is unaware, and which may be averted by another, by control of the dangerous force, or the giving of proper warning. It may arise from an unusual operation or from an ordinary operation. The point is, that the one in danger is unaware of it, and the master or his agent seeing the situation may, by reasonable and ordinary care and the use of the means at hand, avert an apparent and impending disaster to a human being.

However, defendant had the benefit of its submission, and of that cannot complain. It complains here, not

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so much of the submission of the proposition, as that it was erroneously stated, in that the instruction, in effect, said the plaintiff did not assume a risk arising from defendant's negligence, which, counsel say, is bad law. There are cases in which so broad a statement of the rule would be improper. For example, the case cited by counsel, *Preble v. Union Stock Yards Co.*, ante, p. 383. The negligence consisted in the nearness of the different tracks to each other, but with which situation the injured person was acquainted, and on which he had worked without objection for a considerable time. As applied to the case being tried, we think the language of the court was entirely correct. The supreme court of the United States has, we think, laid down the authoritative rule which governs this case, in *Chesapeake & O. R. Co. v. De Atley*, 241 U. S. 310, wherein it is stated:

"According to our decisions, the settled rule is not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer, or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them."

Supporting the same rule are *Huxoll v. Union P. R. Co.*, 99 Neb. 170; *Fitzpatrick v. Hines*, 105 Neb. 134.

Appellant further argues that, the case being sent to the jury on the question of last clear chance only, if the evidence leaves no room for the application of the doctrine of last clear chance, then the verdict and judgment are without any foundation. This is based upon a consideration of the evidence, all of which we have examined as set out in the briefs, and in full as it is contained in the record. The jury determined the

facts adversely to defendant's present contention. We believe there is hereinbefore set out a sufficient reference to the issues and evidence to indicate the propriety of the submission as made, and hold that appellant has not just cause of complaint in reference thereto. *Wilson v. Union P. R. Co.*, 107 Neb. 111. We reach the same conclusion as to the alleged inconsistency between the statement of the issues as given in the instruction from which quotation is made herein and the one next following which required plaintiff to establish by a preponderance of the evidence "that the defendant was negligent in some particular as alleged in the petition."

We do not consider it necessary to discuss in detail the instructions requested by defendant. We have examined all of them. Aside from those which were, in effect, instructions directing a verdict for defendant, they were mostly open to the criticism of improperly commenting upon the evidence, and the weight which should be given to it. We find that the trial court reasonably and fairly covered by its instructions given all essential issues involved under the pleadings and the evidence in the case, including those represented by defendant's requests in so far as they were proper and material to go to the jury.

Finally, it is insisted that the amount of the verdict, which was for \$13,000, is excessive. The plaintiff at the time of the injury was an experienced laborer in that capacity, 62 years of age, of robust physique, and earning \$3.20 a day. His right leg was severed between the hip and the knee, and he complained still, two years later, of suffering from the injury to his head. We concede that the award was liberal, probably more liberal than would be made by the same jury in the same case at this time. The injury was sustained in July, 1919, and the verdict returned in May, 1921, which we must recall was during the time when labor and all other things were at war-time prices, which condition probably to some extent affected the amount of the

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verdict. Assuming that this was so, the plaintiff had the same right as others to have his financial matters adjusted on the current basis. He has, by the delays incident to legal procedure, been prevented during two additional years from receiving the amount found to be his due, and we do not find the amount so unreasonable that he should now by this court be required to accept a reduction.

The judgment of the trial court is

AFFIRMED.

AUGUST BRANDEEN, APPELLANT, v. RALPH M. BEALE ET AL.,
APPELLEES.

FILED JULY 13, 1923. No. 23354.

Insane Persons: APPOINTMENT OF GUARDIAN: VALIDITY. A proceeding in county court for the appointment of a guardian for the person and estate of an alleged incompetent person, which is based upon a petition by a creditor, and not by any relatives or friends of the alleged incompetent, as prescribed by statute (Comp. St. 1922, sec. 1589), and in which the alleged incompetent did not appear and was not represented by guardian *ad litem* or otherwise, and none of the relatives or friends were notified or appeared, and in which there is no finding that the individual was mentally incompetent to have the charge and management of his property, is void and subject to collateral attack.

APPEAL from the district court for Lancaster county:
ELLIOTT J. CLEMENTS, JUDGE. *Reversed.*

C. C. Flansburg and John S. Bishop, for appellant.

Sterling F. Mutz, Claude S. Wilson and Albert S. Johnston, *contra.*

Heard before MORRISSEY, C. J., ROSE and GOOD, JJ.,
BLACKLEDGE, COLBY and REDICK, District Judges.

BLACKLEDGE, District Judge.

The controversy in this case is submitted upon a case stated by agreement of the parties. It arises upon a petition by the plaintiff, appellant, alleging that he had been engaged in operating a general store at Waverly,

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Nebraska; that defendants, having conspired together to ruin him and destroy his business, unlawfully obtained possession of his stock of goods and converted them to their own use to the plaintiff's damage. The defendants answer, admitting ownership of the goods, denying the other allegations of the petition, and further alleging that the plaintiff had no capacity to maintain the action for the reason that he was under guardianship by reason of mental incapacity; that defendant Ralph M. Beale had been duly appointed guardian of plaintiff by the county court of Lancaster county prior to the time of the acts charged in the petition, and that he had ever since continued to act as such guardian, and had not been discharged. It is the issue raised by this part of the answer as to the status and effect of the guardianship proceedings with which we have to do on this appeal. This was tried as a plea in abatement in the trial court, and it was then, and is now, agreed by counsel that if the alleged defense was good the action must fail, otherwise it might still be tried. The district court held the defense good, and dismissed the action. The plaintiff has appealed, and the question submitted to this court for determination is the validity of the guardianship proceedings, or, rather, whether the same are subject to collateral attack.

The petition in the county court for the appointment of a guardian was by J. D. Lau, one of the defendants, and alleged the residence of the parties; that the petitioner was a creditor of August Brandeen, who was possessed of certain property in the county; and that by reason of advanced age and mental and physical weakness the said Brandeen was incompetent to take charge of and manage said property; that Ralph M. Beale of said county was a suitable and competent person to act as guardian, and prayed for the appointment of Beale as such guardian. A notice was personally served upon Brandeen, as to the form and substance of which no question is raised herein, and on June 22, 1921, a decree was entered finding: "That it is necessary and convenient that a guardian be ap-

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pointed of his person and estate for the reasons as set out in the petition filed herein and that Ralph M. Beale is a fit and suitable person to act as such guardian." Other matters are contained in the case stated, but it is not deemed necessary to set them out in the present discussion.

The plaintiff contended, and here contends, that the proceedings were void, and hence subject to collateral attack, and constituted no defense in the present action, because the county court was without jurisdiction, as disclosed thereby, to appoint a guardian, and with this contention we are inclined to agree.

The statute by which an appointment in proper cases is authorized (Comp. St. 1922, sec. 1589) provides:

"When the relatives or friends of any insane person, or of any person who, by reason of extreme old age, or other cause, is mentally incompetent to have the charge and management of his property, shall apply to the county court to have a guardian appointed for him, the court shall cause a notice to be given to the supposed insane or incompetent person of the time and place of hearing the cause, not less than fourteen days before the time so appointed."

It will be noted that the petitioner in this case described himself as a creditor, and it is contended that such a person does not come within the authorization of the statute, but that the only persons authorized to institute the proceedings are the relatives or friends of the incompetent person. It is argued on behalf of appellee that, the county court being a court of general jurisdiction in such matters, all presumptions are to be indulged in support of its judgments and proceedings, and that the fact that the petitioner described himself as a creditor is not inconsistent with the fact of his being also a relative or friend, and that this court should indulge such presumption in support of the proceeding. We think, however, that we are precluded from indulging such presumption. If the petitioner had been either

relative or friend, it would have been as easy to so describe himself as to say that he was a creditor, and if he had regard to the provisions of the statute under which he was applying to the court, the fact that he did not describe himself by either of the terms used therein would lead logically to the inference that he was not entitled to do so. In this particular portion of the statute three classes of guardians are mentioned, namely, those for minors, for insane or incompetent persons, and for spendthrifts. No provision seems to be made as to what particular person or class of persons shall invoke the action of the court in the case of minors. In the case of incompetent persons the statute provides that, when the relatives or friends of the incompetent person apply to the court, then proceedings may be had. It is true, as cited from the case of *Foote v. Chittenden*, 106 Neb. 704, that all matters necessary to give the court jurisdiction upon which the record is silent are presumed. We think, however, that the answer to the argument has been made by the highest court in the land in the case of *Galpin v. Page*, 18 Wall. (U. S.) 350, wherein, in the opinion by Mr. Justice Field, it is said that the presumptions which the law implies in support of the judgments of courts of general jurisdiction only arise with respect to jurisdictional facts concerning which the record is silent. Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that the fact was otherwise than as averred. Were not this so, it would not be possible to attack collaterally the judgment of such court, although a want of jurisdiction might be apparent upon its face; the answer to the attack would always be that, notwithstanding the evidence or the averment, the necessary facts to support the judgment are presumed.

The rule, we think, is that, if the record on the whole shows that something was done to acquire jurisdiction which was insufficient, it will not be presumed that some other thing not shown by the record was done which would confer jurisdiction; and if the court cannot try the question except under particular conditions or when approached in a particular way, the law withholds jurisdiction unless such conditions exist or the court is approached in the manner provided. 12 Ency. Pl. & Pr. 120. The proceeding, so far as the jurisdiction of the county court is concerned, is purely statutory; and as it is one involving both the rights of person and property, according to all rules of law applicable to such proceedings, the statute must be strictly followed or the court or officer exercising the authority will not obtain jurisdiction and their proceedings will be void. This was held by the supreme court of Wisconsin in the *Appeal of Royston*, 53 Wis. 612, which was determined under a statute requiring that in such cases a relative or friend of the person for whom the appointment of a guardian was sought should present to the county court of the proper county a verified petition. The petition in that case showed it was made by a friend, but it was not verified, and upon that ground the court held the proceedings void. This was an appeal from the circuit court, the case had been tried *de novo* in that court upon appeal from the county court, and the supreme court held that the circuit court acquired no jurisdiction because the county court had none and dismissed the whole proceeding. Although dismissing the case upon the ground stated, it is said in the opinion that the county court should not proceed in such cases, even upon the application of a friend, unless it appears from the petition that there is some good reason why the application is not made by the relatives.

In this case the alleged incompetent did not appear in person or otherwise at the hearing, no guardian *ad litem* was appointed for him, and no relative or friend was notified of, or appeared at, the hearing. This court in

Prante v. Lompe, 77 Neb. 377, held that in such cases the next of kin are proper parties and may appear in court and contest the proceeding. The supreme court of Michigan, under a statute identical in terms with ours, has held that notice must be given to the heirs presumptive and next of kin in order to confer jurisdiction. *In re Myers*, 73 Mich 401; *In re Bassett*, 68 Mich. 348. It is also held by the same court that it is necessary that there be a decree by the judge of probate adjudging the person mentally incompetent and that the adjudication should appear of record. *North v. Joslin*, 59 Mich. 624. It would seem that jurisdictional requirements have not been met.

It is urged that we should follow in this case the rule which has been prescribed in reference to proceedings for the administration of estates as stated in *Larson v. Union P. R. Co.*, 70 Neb. 261, to the effect that even a stranger may make the necessary petition or application to the county court. We think, however, that there are material and substantial reasons which would render the application of that rule improper in cases of this kind. Administration proceedings are essentially *in rem* and their primary purpose the collection and distribution of assets of a deceased person. This proceeding is essentially *in personam* and has to do with the liberty of an individual and incidentally the control of what property he may have. In administration proceedings the court, before action, gives a notice which is binding upon all the world; in this guardianship proceeding no notice was given, other than to the incompetent. The statute under consideration in the *Larson* case does not prescribe the person by whom the application is to be made, but the classes of persons to whom administration may be granted; it was therefore, properly held that the determination of that fact had relation to the manner of exercise of jurisdiction. In this case we are upon its threshold met with the statutory requirement that, when the relatives or friends of the supposed incompetent apply to the court,

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then the court shall act. This would seem to exclude the right of action by the court except under the conditions prescribed. And so we have here an instance wherein the application to the court was not made by any one of the classes of persons prescribed by the statute, none of those persons were notified of, or were present or participated in, the proceeding; no guardian *ad litem* was appointed for the alleged incompetent; he was not otherwise represented and did not appear at the hearing; nor does the decree contain a specific finding that he was mentally incompetent to have the charge and management of his property. Under these circumstances, and for the reasons stated, we are constrained to hold that the guardianship proceedings in question were void and subject to collateral attack.

Other questions are discussed in the briefs, but they are incidental, and this disposition of the principal controversy disposes of the case. The judgment of the district court is therefore reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED.

R. A. BENNETT, APPELLANT, v. C. W. MOON, APPELLEE.

FILED JULY 13, 1923. No. 22390.

1. **Specific Performance.** Under a proper state of facts, courts of equity will take cognizance of actions requiring the specific performance of agreements concerning real property, including leases as well as deeds.
2. ———. While the granting of the equitable remedy for the specific performance of a contract to convey or lease real property is a matter of discretion, yet this means a sound discretion controlled by established principles of equity, and when the contract is in writing, is certain in its terms, is fair and just and capable of being enforced without hardship, the remedy should be granted as a matter of course.
3. ———: **LEASES: IMPLIED COVENANTS.** Where a written executory contract to lease contains a definite statement of the particular elements of the lease, but is silent as to the general, usual and ordinary covenants and conditions, these will be implied and a decree for specific performance granted.

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APPEAL from the district court for Polk county:
GEORGE F. CORCORAN, JUDGE. *Reversed, with directions.*

Edward A. Coufal, for appellant.

Matt Miller and Mills, Beebe & Mills, contra.

Heard before MORRISSEY, C. J., DAY and ALDRICH, JJ.,
COLBY and REDICK, District Judges.

COLBY, District Judge.

This action was instituted by the plaintiff, R. A. Bennett, to compel the defendant, C. W. Moon, to specifically perform their written agreement, under the terms of which the defendant had agreed to execute a lease for the first story and basement of a brick building owned by the plaintiff and located in the business section of David City, Butler county, Nebraska. The following is a copy of the agreement:

"This agreement made in duplicate, this 27th day of December, 1919, by and between R. A. Bennett of David City, Nebraska, as party of the first part, and C. W. Moon of Shelby, Nebraska, as party of the second part,

"Witnesseth: That the party of the first part has this day sold to the party of the second part, and the party of the second part has purchased from the party of the first part, all the stock of merchandise owned by first party located in David City, Nebraska.

"It is further and specifically agreed by and between the above parties that possession of said stock is to be given second party on the 1st day of February, 1920; that it is reserved to first party to sell any of said stock in a sale that first party may hold, and first party is to deliver to second party only so much of said stock as shall be left in said store after said sale, and on the 1st day of February, 1920; when said second party shall come into possession of said stock, then the parties agree that so much of said stock as shall remain in said store shall be invoiced, and second party shall pay to first party as the purchase price for said stock eighty (80) cents for each

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one dollar of invoice price of said stock at the time of invoice.

"Second party has this day paid first party, and first party hereby acknowledges the receipt thereof, the sum of one thousand dollars (\$1,000) as a part payment on said stock, and as earnest money on this contract. The balance of the invoice price of said stock over and above said \$1,000 so paid, it is to be paid by second party to first party when possession is given and the invoice completed.

"It is further understood and agreed by and between the parties hereto that the first party is to lease to the second party for a term of five years the first floor and basement of the building where the Bennett store is now located in David City, Nebraska, which is the property of the first party, and second party agrees to pay therefor the sum of \$100 per month payable on the first of each month. It is agreed that a lease shall be executed covering this agreement between the parties hereto as to said building.

"In testimony whereof the parties have hereunto set their hands this 27th day of December, 1919.

"(Signed) R. A. Bennett, First Party.

"C. W. Moon, Second Party."

"Executed in the presence of R. D. Fuller."

It is alleged in the pleadings and undisputed in the evidence that all the provisions of the agreement were completed and complied with, excepting those relating to the execution of the lease of the property; and it further appears that the defendant took possession of the property in February, 1920, pursuant to such written agreement, and paid the stipulated rental until January, 1921, when he removed his effects and ceased to pay rent, and that a lease was executed by the plaintiff with the usual covenants and tendered to the defendant for his execution, but that defendant refused to execute such lease, after formal demand, and plaintiff then commenced this action for specific performance.

The trial court found that the contract was fairly entered into and signed without any misconduct, conceal-

ment or misrepresentation or without any other inequitable contract on the part of either party; that such contract was fair and just in its terms and was made upon a valuable consideration; and that the terms of said agreement were mutual.

The district court further found that the premises intended to be covered by the terms of the contract for the lease were the first story and basement in the brick building located on lot 4, in block 26, in the original town of David City, Nebraska; that the defendant "took possession of said portion of said building pursuant to and in performance of the contract;" that prior to February, 1921, the defendant "refused to further carry out said contract;" that while a key to the building was turned over to plaintiff, when defendant removed his effects, yet the plaintiff did not accept the key with the intent of abandoning his rights or canceling the contract obligations, or releasing the defendant from such contract.

The district court finished its findings with this statement: "Upon the findings as above set forth the court concludes as a matter of law that the parties to this action never made or entered into any agreement as to the terms of the lease for said building owned by plaintiff except as to the rent to be paid per month and the term which said lease was to run; and that, said parties never having made or entered into any agreement as to the other terms to be inserted in said proposed lease, the plaintiff is not entitled to specific performance."

The first question presented for our determination is whether the district court had equitable jurisdiction to decree the specific performance of an executory contract to lease.

The rule of law seems to be well settled that courts of equity will take cognizance of actions requiring the specific performance of agreements concerning real property, and that the rule applies as well to leases as to deeds. This power of courts of equity is regarded as discretionary, yet it is limited to fixed and established

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equitable principles, and, unless exercised within these limitations, it has been adjudged to be arbitrary and capricious. It is generally held by the best judicial authorities that, under a proper state of facts, the right to the remedy of specific performance is perfect, and the court cannot, in any sense, exercise its discretion to deny relief. It has been announced that when a contract, of which equity has jurisdiction, conforms with certain equitable principles, which are quite limited in number, it is as much a matter of course for a court of equity to decree specific performance as for a court of law to give damages for a breach of the contract. The formula as to judicial discretion, therefore, is habitually used by the courts simply to indicate that the cases before the court are governed, not by legal rules, but by some well-established equitable principles.

Further, where the contracts involved concern land, or, in general, where land or any estate or interest in land is the subject-matter of the agreement, the jurisdiction to enforce specific performance is undisputed, and does not depend upon the inadequacy of the legal remedy in the particular case. To emphasize and restate the above principle, it is as much a matter of course for courts of equity to decree the specific performance of a contract for the conveyance or lease of real estate, which is in its nature unobjectionable, as it is for courts of law to give damages for its breach. Equity seems to have adopted this principle as a general governing rule. This is not because the land is fertile or rich in minerals, but because it is land, "a favorite and favored subject in England and every country of Anglo-Saxon origin." Land is assumed to have a peculiar value so as to give an equity for specific performance without reference to its quality or quantity.

The following extract from Pomeroy, *Equitable Remedies* (2d ed.) sec. 2184, plainly recognizes and enunciates the limitations upon the discretionary latitude applicable to suits for the specific performance of real estate contracts given to courts of equity:

"The granting the equitable remedy is, in the language ordinarily used, a matter of discretion, not arbitrary, capricious discretion, but of a sound judicial discretion, controlled by established principles of equity, and exercised upon a consideration of all the circumstances of each particular case. Where, however, the contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions, and is capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award a judgment of damages for its breach. This is the ordinary language of judges and text-writers. The term 'discretionary,' as thus used, is, in my opinion, misleading and inaccurate. The remedy of specific performance is governed by the same general rules which control the administration of all other equitable remedies. The right to it depends upon elements, conditions and incidents, which equity regards as essential to the administration of all its peculiar modes of relief. When all these elements, conditions, and incidents exist, the remedial right is perfect in equity."

These limitations upon the discretionary powers of courts of equity have been approved by this court in the following language: "Whether a decree for the specific performance of an agreement for the sale of real estate will be granted rests in the discretionary power of the trial court, sitting as a court of chancery. Such discretion, however, is not unlimited, and a decree is not to be given or withheld arbitrarily and capriciously, but it is a judicial discretion, to be controlled and governed by equitable rules and principles." *Hector-Johnston Co. v. Billings*, 65 Neb. 214. See, also, *Stanton v. Driffkorn*, 83 Neb. 36; *Waldo v. Lockard*, 96 Neb. 490.

The foregoing citations are sufficient to authorize us to answer in the affirmative the first question, and to show the recognized principle that equity takes cognizance of all actions requiring the specified performance of an

agreement concerning real property or any estate or interest in land, including the execution of leases.

The next question to be determined is whether the written executory agreement in respect of the particular terms of the lease agreed to be executed contains a definite and specific statement of all the material elements necessary to require the discretionary power of the court to enter a decree of specific performance.

It will be observed that the local or particular, material terms of this agreement to execute a lease are all definitely fixed and undisputed, and each of the parties has so admitted by the form of lease submitted by him. There is no disagreement whatsoever regarding the date of the commencement of the term, the duration of the lease, the rental to be paid, when payable, and the specific description of the premises demised. These are all fully understood and agreed upon by the parties. It seems to follow, then, that as to the real, necessary and material elements of the lease the agreement is clear, definite and complete, and upon these the parties seem to have been of one mind and the lower court in no doubt.

This brings us to the real or main matter of controversy in this case, which is that, where the material elements of the agreement to lease are definitely agreed upon, but the contract is silent as to the general, usual and ordinary covenants and conditions, can such a contract be enforced by specific performance? In other words, are these covenants and conditions to be implied in law, or must they be definitely set forth in the agreement in order to be inserted in the lease by decree of a court of equity? While the contract provides "that a lease shall be executed covering the agreement between the parties hereto as to said building," it is silent as to the usual conditions, covenants and other general provisions contained in an ordinary lease.

From an examination of the recognized text-books and the adjudicated cases, it appears that it has long since been the settled law that, where there is no specification

in the contract to execute a lease covering the usual and ordinary covenants and provisions, these will be implied by the courts of equity. This rule was established in England as early as the famous decision in *Dumpor's* case, and is clearly stated in *Church v. Brown*, 15 Ves. Jr. (Eng.) *258, *271, in this language: "There was no sort of difference, whether the agreement in the terms of it did or did not refer to usual or proper covenants; that in every agreement, whether as to freehold or leasehold estate, it was implied, that there were to be usual and proper covenants."

This rule of law is recognized, with some exceptions, by the courts of this country. In 36 Cyc. 792, the general principle of construction is briefly stated thus: "A contract to execute a lease calls for a lease with the usual covenants."

The annotator of the L. R. A. states the rule to be: "Specific performance of an agreement for a lease will be decreed with such covenants as are usual and incident to leases of the same kind, and such as flow from the contract and are necessary to give it effect." Note in 20 L. R. A. 36.

The same principle of law is announced in *Eaton v. Whitaker*, 18 Conn. *222, in which the court say: "Where nothing was said as to its terms, at the time when the agreement was made," the decree will require the demurring party "to execute a lease containing the usual provisions."

As has been noted, the same general established rules of law applicable to contracts for leases apply to contracts for deeds, and in general to all interests in land. The following are some of the numerous adjudicated cases so holding: *Dwight v. Cutler*, 3 Mich. *566; *Dewey v. Hines*, 87 Kan. 834; *Drake v. Barton*, 18 Minn. 462.

The author of the article entitled "Vendor and Purchaser" in Cvc., after an examination of the authorities bearing on this question, makes the following deduction as to deeds: "When the contract does not stipulate as

to the character of the deed or for covenants therein, some of the authorities hold that no covenants are necessary and that a quitclaim deed satisfies it. By the weight of authority, however, the purchaser, notwithstanding nothing is said in the contract regarding covenants, is entitled to a deed with covenants." 39 Cyc. 1555, and cases cited.

The learned counsel for the defendant, in opposition to this general rule of law, cite judicial authorities from several states, including the case of *Peterson v. Ramsey*, 78 Neb. 235. An examination of these cases is not convincing that the established rule of equity as to the usual and ordinary covenants and provisions should be done away with, and the case decided by this court referred to may be considered as but a proper modification of the rule as applicable to particular circumstances. The facts always require courts of equity to enforce, not an arbitrary rule, but to exercise sound discretion based upon established equitable principles.

The district court, in *Peterson v. Ramsey*, *supra*, decreed that the defendant should execute a deed of general warranty to plaintiff Peterson, but this was considered inequitable by this court, upon appeal, for the reason that Rublee had received only a quitclaim deed from Ramsey, which gave him no recourse upon Ramsey, and that therefore Rublee, who had no remedy against a prior grantor in case of failure of title, should execute simply a quitclaim deed with covenants against his own acts or omissions, and not a deed of general warranty.

The other cases cited by counsel for defendant fall far short of deciding that the rule of law established in the common law of England and generally approved in this country should not be adopted by the courts of Nebraska. Some of the cases referred to are in states where there is an express statute against "implied covenants" in real estate contracts. In others, a specific performance was refused because of a want of equity.

In *Finty v. Kinder*, 194 Ill. App. 115, especially relied upon by defendant's counsel, the court place the main

ground of refusal upon a waiver of the right, and use this language: "One who enters into an agreement to lease property for a term of years at a stipulated monthly rental waives his rights under the agreement, where the tenant refuses to sign and accept the lease proffered by the landlord and is permitted to remain in possession upon payment of the stipulated rental." It will be seen at a glance that this Illinois case does not pretend to decide that, where the agreement contains the material elements of the lease, the law will not presume the ordinary covenants and conditions and enforce the agreement.

In *Clarke v. Koenig*, 36 Neb. 572, this court properly held, in denying specific performance, that the contract was ambiguous and uncertain, and that plaintiff was in default of his part of the agreement, and also that the contract was for the sale of a homestead of a married person and had not been executed by both husband and wife, any one of which facts was fatal to the right of specific performance.

In *Krum v. Chamberlain*, 57 Neb. 220, this court held that the correspondence relied upon did not eventuate in a valid and enforceable contract, and hence the remedy should be denied.

It does not appear that any of the Nebraska cases cited by defendant's counsel hold adversely to the general rule recognized as to implied covenants and provisions in executory contracts for deeds or leases.

A careful consideration of the agreement and of the admitted facts in the instant case does not convince us that any subsequent negotiations were necessary between the parties or were contemplated by its terms. Each party had the right to assume that the stipulation for a lease, in its legal effect, was an agreement for a lease with usual and ordinary covenants and provisions, and the contract, with this legal implication, is complete. In any event, if such usual and ordinary covenants and provisions were not implied, then there would be a lease of the premises fixing the term, the beginning and ending thereof,

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and the rent to be paid, and this in itself would make the lease complete and subject to the legal incidents operative in the absence of any express stipulation. The undisputed evidence proves that shortly after the agreement was complied with by the parties, with the exception of the execution of the lease, the plaintiff tendered a lease for execution by the defendant, claiming that such lease included the usual and ordinary covenants, as understood by the plaintiff; and a witness, whose testimony is undisputed, testified that the lease so tendered contained only the ordinary covenants and provisions in general use in the state of Nebraska. This lease the defendant refused to execute.

While it is held that certain covenants in a lease or deed are matters of law, such as quiet enjoyment, delivery of possession, etc., yet there are others which are properly held to be questions of fact, and that at different times and places the practice may vary and the court may look to books and precedents in determining what covenants are usual and ordinary, and that experts, such as conveyancers and others, may testify in regard thereto, and further that the question is to be considered in the light of the character of the property leased and the custom in the state or neighborhood.

The evidence shows that the defendant also tendered a lease to the plaintiff. This the plaintiff refused to execute. There is no evidence showing that the covenants contained in the defendant's proposed lease were the usual and ordinary covenants; but, on the contrary, one of the provisions therein was a clause which the defendant wanted to have inserted, but which is under no jurisdiction included among the common or usual provisions in contemplation of the law, or shown by any evidence to be in use in the state of Nebraska. The following is such objectionable provision: "And it is further agreed, that the party of the first part, should the party of the second part or his sublessee put in dry-goods stock for sale in premises, that said party of the first part shall

put in shelving of a kind and character necessary to conduct a dry-goods business, in said store, at his expense." Certainly, the plaintiff was justified in rejecting a lease including this unusual and unauthorized provision.

What both parties were entitled to under the agreement was to have a lease executed containing, not only the specific and necessary material elements agreed upon, but, in addition thereto, the common and usual covenants, conditions and provisions in use in the state of Nebraska. Either party had the right to reject a proposed lease because it included unusual and unauthorized provisions which could only be inserted therein by special stipulation and agreement. Because the defendant could not obtain, and plaintiff would not consent to, a lease which contained unauthorized and unusual provisions, the district court was not justified in finding that, "said parties never having made or entered into any agreement as to the other terms to be inserted in said proposed lease," the plaintiff was not entitled to specific performance. What the parties failed to agree upon were the unusual and unauthorized covenants and provisions.

As we have seen, the material elements were fixed and settled in the written agreement, and the usual and ordinary covenants and provisions applicable to leases in the state of Nebraska were implied, as a matter of law, and the undisputed evidence shows what these were. This agreement and the provisions which the law implies were all settled by the parties when they executed said written agreement, and it necessarily follows that the plaintiff was entitled to the specific performance of such agreement with all its specific stipulations and legal implications, and to have the lease, the terms of which had all been agreed upon and been implied by law, executed by the defendant. In accord with this view, there is nothing in the agreement from which the court can infer that other provisions and covenants are required to be specifically named and stipulated by the parties before the lease is executed. The material elements are certain and fixed,

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and, as a part of such agreement, the usual and ordinary covenants and provisions in use in the state of Nebraska are made a part thereof by implication of law.

Under the established principles of equity and the facts, the plaintiff was entitled to the specific performance of the contract, and to have the defendant execute the lease tendered by the plaintiff and set forth in plaintiff's petition. The decree of the district court is reversed and the cause remanded, with instructions to require of the defendant his specific performance of the agreement as to leasing the premises in question.

REVERSED.

CITIZENS STATE BANK OF BLOOMFIELD ET AL., APPELLANTS,
V. BOARD OF EQUALIZATION OF KNOX COUNTY, APPELLEE.

FILED JULY 13, 1923. No. 22471.

1. **Taxation: BANKS: ASSESSMENT.** Under section 6343, Rev. St. 1913, as amended in 1919 (Laws 1919, ch. 162), providing for the taxation of banks, it is the duty of the county board of equalization, whenever a bank shall have acquired real estate which is assessed separately, to deduct the assessed value of such real estate from the capital stock of the bank.
2. ———: ———: ———. A banking corporation is not authorized by law to deduct in its tax schedule the book value of its banking house property, but can lawfully only deduct the assessed value thereof.

APPEAL from the district court for Knox county:
WILLIAM V. ALLEN, JUDGE. *Affirmed.*

W. A. Meserve, for appellants.

P. H. Peterson and F. A. Barta, contra.

Heard before MORRISSEY, C. J., GOOD and ROSE, JJ.,
BLACKLEDGE, COLBY and REDICK, District Judges.

COLBY, District Judge.

This is an appeal from the district court for Knox county. In the lower court it was an appeal from an order of the board of equalization of Knox county, ordering an amendment to the personal tax schedule of plaintiff bank for the year 1921.

The appellant, Citizens State Bank of Bloomfield, in making out its tax schedule to the assessor of Knox county for the year 1921, deducted from the valuation of its capital stock the value of its banking house property according to the amount as it was carried on the books of the bank in the sum of \$12,375, instead of deducting the assessed valuation for which said property had been separately assessed in the sum of \$8,400. The whole question is as to how section 6343, Rev. St. 1913, as amended in 1919, should be construed.

The assessor and board of equalization of said county gave notice to appellant bank of their intention to amend the tax schedule by deducting the assessed valuation of said banking house property only, or the said sum of \$8,400, instead of the sum of \$12,375, the book value deducted by the bank in its schedule. The bank protested against the proposed change by the board of equalization, but the change was made and the bank appealed to the district court for Knox county. A demurrer was interposed to the petition and sustained by the court, the action was dismissed, and the cause is brought here for review.

Objection is made that section 6343, Rev. St. 1913, as amended in 1919, and as interpreted by the district court, is unconstitutional. Section 1, art. IX of the Constitution of Nebraska of 1875, regarding the uniformity of taxation, has been held to apply to the class taxed. The Constitution does not prohibit double taxation, but provides that the taxation shall be uniform upon the class taxed. Authority was given in the section and article referred to to classify certain business for taxation purposes, but this court held at the time that this power did not prohibit the legislature from making such classifications as it deemed proper, and the state ever since has freely exercised such power. *State v. Lancaster County*, 4 Neb. 537; *State v. Fleming*, 70 Neb. 523, 529; *Smith v. Stephens*, 173 Ind. 564, 30 L. R. A. n. s. 704; *McCulloch v. Maryland*, 4 Wheat. (U. S.) *316, *428.

From these authorities we may properly conclude that section 6343, Rev. St. 1913, as amended in 1919, is constitutional and valid. Banking is declared to be a quasi-public business by our revised statutes and subject to the regulation and control of the state. A bank can only do what the law permits it to do. Its full and only authority comes from the legislative acts authorizing its existence. When the statutes say that a bank shall have the right to deduct the assessed value of real estate, which has been separately assessed, the state is acting within its authority, and only the assessed valuation of said real estate can be deducted. The statute is the sole authority for making any deduction. It is clear that, if the legislature had intended that a bank should be allowed to deduct the valuation of its banking house as the same was carried on its books, that is, its book value as fixed by the bank, which the appellants contend they should be allowed to do, it would have been so stated in the statutes.

The following is the wording of the clause of chapter 162, Laws 1919, under consideration: "Whenever any such bank, association or company shall have acquired real estate which is assessed separately, the assessed value of such real estate shall be deducted from the valuation of the capital stock of the association or company." It has been properly said that the power of taxation is inherent in the state and that the government could not perform its functions without this power. It may be limited by the Constitution, but exists without express authority as a necessary attribute of sovereignty. The power of taxing the people and their property is essential to the very existence of the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. *McCulloch v. Maryland*, 4 Wheat. (U. S.) *316, *428.

In *Smith v. Stephens*, *supra*, this question was passed upon by the supreme court of Indiana; the controversy arising over the wording of a statute substantially the

same as ours as to the manner of assessing the shares of stock in a banking business. The wording of the Indiana statute was as follows: "Whenever any such bank, banking association or trust company shall have acquired real estate, the assessed value of such real estate shall be deducted from the valuation of the capital or capital stock of such bank, banking association or trust company." The suit was brought by the stockholders of the bank enjoining the treasurer from collecting alleged unlawful taxes assessed against them on their shares of stock. It was held: "Stockholders of a bank are not denied constitutional privileges and immunities, uniformity of taxation, or the equal protection of the laws, by a statute allowing a deduction, in fixing the value of its capital stock for taxation, of only the assessed value of real estate held by it, rather than the amount invested in real estate, although it results in the taxation of the real estate to its full value, while such property is assessed to others at only a fraction of its value." *Smith v. Stephens*, 30 L. R. A. n. s. 704 (173 Ind. 564).

Another case applicable to the construction of the Nebraska statute under consideration is that of *State v. Shryack*, 179 Mo. 424, in which the same principle of construction is announced.

Under our law the shares of the bank are the unit of taxation, and each of the individual shares is taxed to the respective shareholders as personal property, and the bank as an entirety, as a corporation, is not taxed at all. By the statute provision is made to obtain a basis for taxing the shareholders and the assessor is required to determine and settle the true value of each share of stock, and such share then forms the unit or basis of taxation. It is taxed as personal property upon its true value, as determined by the assessor, and it matters not the kind of property, taxable or nontaxable, which goes to make up its value.

It is worthy of note that the shares of stock are taxable to the stockholders even though all or any part of such

bank stock may be invested in nontaxable government bonds. It is not a question of double taxation or single taxation or the nontaxation of certain property, a part of which goes to make up the value of the shares of stock. While double taxation should be avoided, yet it is a common fact that this condition, as well as the escape of certain property from taxation, results in many instances.

The language of the statute is plain and unequivocal that, whenever any bank shall have acquired real estate which is assessed separately, the "assessed value," not the "book value," shall be deducted from the valuation of the capital stock of the banking association, and then the further duty devolves upon the county assessor to determine and settle the true value of each share of stock after an examination of the statement and report of the bank.

It is admitted that it is the settled policy of our law to guard against double taxation, if possible, but such taxation is not held to be unconstitutional, as is evident from a consideration of the following cases: *Nye-Schneider-Fowler Co. v. Boone County*, 102 Neb. 742; *First Trust Co. v. Lancaster County*, 93 Neb. 792; *Bankers Life Ins. Co. v. County Board of Equalization*, 89 Neb. 469. The phrase used in the law, "the assessed value of real estate," means simply and only what the ordinary definition of the words imports, and the law under the interpretation and definition given, as we have seen, is not held unconstitutional.

Our statutes provide that property shall be assessed at its actual value, and we must presume that the assessor has done his duty. However, if the assessor did not assess the banking house property of appellant at its actual value, it is no reason for complaint against the law. Banking corporations and other organizations are given many privileges and immunities in business, taxation and in the variety of avenues in which their labors enter, not given to private individuals. A bank is an

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artificial person subject to the laws applicable to the class to which it belongs. Individuals, in many things, are discriminated against in favor of banks. A bank is not obliged to pay taxes upon its borrowed money or the money of its depositors, a privilege which no individual is given. Many cases could be enumerated, showing discrimination between banks, firms and other kinds of corporations, but these do not make the laws unconstitutional.

As before stated, the law of uniformity of taxation need be uniform only as to the class taxed, but may not be uniform as to other and different classes. The constitutional requirements are complied with when the property of a banking corporation is assessed in the manner prescribed by law at its fair value, the same as an individual's property is assessed at its fair value.

In our judgment the board of equalization of Knox county had full authority to deduct the assessed valuation of the banking house property of appellant bank in the sum of \$8,400 from the tax schedule of the bank, in place of the sum of \$12,375 deducted by the bank, and the district court was right in sustaining the demurrer and dismissing the action, and its judgment should be, and is,

AFFIRMED.

JOHN TASICH V. STATE OF NEBRASKA.

FILED JULY 13, 1923. No. 23160.

1. **Criminal Law:** SEPARATE OFFENSES. Section 9553. Comp. St. 1922, defines several distinct independent offenses of equal rank, no one of which is embraced within the other.
2. ———: INSTRUCTIONS. Under an information charging defendant with shooting with intent to kill, it is error to instruct the jury that this offense includes the lesser offense of shooting with intent to wound or of assaulting with intent to inflict a great bodily injury.
3. ———: CONVICTION. Under an information charging defendant with shooting another person with intent to kill, such defendant cannot be convicted of an assault with intent to do a great bodily harm.

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ERROR to the district court for Douglas county:
CHARLES LESLIE, JUDGE. *Reversed.*

*Jamieson, O'Sullivan & Southard, Richard J. Organ
and John T. Marcell, for plaintiff in error.*

*O. S. Spillman, Attorney General, and Lee Basye,
contra.*

Heard before MORRISSEY, C. J., ROSE and GOOD, JJ.,
BLACKLEDGE, COLBY and REDICK, District Judges.

COLBY, District Judge.

The defendant was tried and convicted in the district court for Douglas county upon an information in which he was charged with maliciously shooting with intent to kill, the charging part of the information being as follows: "That on or about the 22d day of March, in the year of our Lord one thousand nine hundred twenty-two, John Tasich and Joe Tasich, late of the county of Douglas aforesaid, in the county of Douglas and state of Nebraska aforesaid, then and there being, then and there being in said county, then and there in and upon one Stella Denie, then and there being, unlawfully, feloniously and maliciously did make an assault and then and there with a certain pistol loaded with gunpowder and leaden bullets, which said pistol they, the said John Tasich and Joe Tasich, then and there in their right hands had and held, her, the said Stella Denie, did shoot with the intent in so doing wilfully, maliciously and feloniously, her, the said Stella Denie, to kill, contrary to the form of the statute," etc.

Defendant was arraigned and plead not guilty to the offense charged in the information, was tried by a jury, and under the instructions of the court the jury found him guilty, their verdict being in the following language: "We, the jury * * * do find the said defendant guilty of assault with intent to do great bodily injury, as charged in the information." Motion for a new trial was overruled and defendant was sentenced to three years in the penitentiary. To reverse these proceedings and the

judgment, the defendant filed his petition in error in this court.

It is plain that the information was brought under section 9553, Comp. St. 1922, which is as follows: "Whoever shall maliciously shoot, stab, cut, or shoot at, any other person with intent to kill, wound, or maim, such person, shall be imprisoned in the penitentiary, not more than twenty years nor less than one year"—charging the defendant with maliciously shooting Stella Denie with intent to kill. This section of the statute clearly contains a number of distinct substantive crimes, no one of which is a part of or embraced within any of the others.

The district court in its instruction No. 5 used this language: "Embraced within the crime of shooting with intent to kill is the lesser offense of shooting with intent to wound. The statute of this state pertaining to the offense of shooting with intent to wound provides: 'Whoever assaults another with intent to inflict a great bodily injury, shall be punished, on conviction thereof,' as provided by law."

Under section 9553 of the statute the offense of shooting with intent to wound is not embraced within the crime of shooting with intent to kill, but each is an independent substantive crime of equal rank. Further, the district court seems to have transferred the offense contained in section 9556 to and made it a part of section 9553, although beyond question the two are entirely distinct and separate.

The instructions substituted the crime of assault with intent to inflict a great bodily injury, as found in section 9556, which is an entirely different and distinct, independent offense, not even embraced in the same section, for the one contained in the information, and thus enabled the jury to find defendant guilty of a crime with which he was not charged and for which he was not on trial.

The sections of the statute under consideration seem to be plain and their language incapable of two con-

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structions. The law appertaining thereto is settled and unequivocal and the proceedings and judgment of the district court are clearly erroneous and should be reversed, and, as the defendant has been in jeopardy, he is entitled to be discharged.

The judgment and proceedings of the district court are reversed and the defendant will be discharged from further prosecution for the offense contained in the information.

REVERSED AND REMANDED.

FRANCIS E. NASH ET AL. V. STATE OF NEBRASKA.

FILED JULY 13, 1923. No. 23260.

1. **Indictment and Information:** DUPLICITY. An information charging defendants with unlawful possession of a still for the manufacture of intoxicating liquors and unlawful possession of other equipment for the manufacture of intoxicating liquors, and also unlawful possession of 30 gallons of mash being used in the manufacture of intoxicating liquors, sets forth only one offense, and should not be quashed for duplicity. The act made criminal by law is the unlawful possession of equipment or material for the manufacture of intoxicating liquors.
2. **Jury:** CHALLENGES: WAIVER. When the defendants, being tried together, do not demand the full number of challenges allowed under the statutes, they will be held to have waived their rights thereto.
3. **Criminal Law:** SEPARATE TRIALS. The statute only grants the right of separate trial to persons charged with a felony, not to those jointly charged with a misdemeanor, and defendants' motion for separate trials was properly overruled.
4. **Evidence:** SUFFICIENCY. The court properly submitted the case to the jury upon the evidence and instructions, and an examination of the record shows that there was sufficient evidence to justify and sustain the verdict.

ERROR to the district court for Adams county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

J. E. Willits, for plaintiffs in error.

O. S. Spillman, Attorney General, and *Lloyd Dort*, contra.

Nash v. State.

Heard before MORRISSEY, C. J., LETTON, ROSE and DEAN, JJ., COLBY and REDICK, District Judges.

COLBY, District Judge.

This is a criminal action brought by proceedings in error to this court by the defendants Francis E. Nash and Ernie C. Noble, who were prosecuted in the district court for Adams county for having unlawfully in their possession a still and other equipment for the manufacture of intoxicating liquors, and also for unlawfully having in their possession about 30 gallons of mash being used in the process of manufacturing intoxicating liquors.

The defendants were tried jointly, convicted by a jury, and each defendant sentenced to pay a fine of \$500 and to serve 30 days in the Adams county jail, and taxed with the costs of the prosecution.

The defendants filed a motion in the district court to quash the information, in the following language: "The defendants and each of them severally move the court to quash the information filed herein, for the reason that more than one offense is sought to be charged in a single count thereof, and the same is contrary to law." This motion was overruled by the district court and is the first assignment of errors of which complaint is made.

The charging part of the information upon which the defendants were tried is as follows: "That Francis E. Nash and Ernie C. Noble, late of the county aforesaid, on the 6th day of April, A. D. 1922, in the county of Adams, and state of Nebraska aforesaid, did unlawfully have in their possession a still and other equipment for the manufacture of intoxicating liquors, and did also unlawfully have in their possession about 30 gallons of mash being used in the process of manufacturing intoxicating liquors, all contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska."

The language of the information as to the statement of the offense follows very closely that of the statute,

which, in section 3252, Comp. St. 1922, contains a statement of the offense and the definition of the possession which is made unlawful. In this section it is declared to be unlawful for any person to "maintain or have possession of any still, or equipment for the manufacture of alcohol or whiskey or of any mash or intoxicating liquor in any stage of manufacture." This section also contains the further provision that any person "who shall have possession of any still or any part thereof or of any other equipment for making intoxicating liquor or who shall have in his possession any mash or other material being used in the process of manufacturing intoxicating liquor, * * * shall, upon conviction, be fined," etc.

It is contended by counsel for defendants that the information contains more than one offense; that the unlawful possession of a still is an offense, that equipment for the manufacture of intoxicating liquor is an offense, and that the unlawful possession of the 30 gallons of mash being used in the process of manufacturing intoxicating liquors is also an offense under the statute, and that all three offenses are charged in the one count in the information, and that these three distinct offenses should each be charged in a separate count.

We are referred to section 3278, Comp. St. 1922, covering the practice under the intoxicating liquors act, which provides that "separate offenses may be set out in separate courts, and any and all offenses hereunder may be joined in the same indictment, information," etc., and that "the accused may be prosecuted and convicted upon all or any of said counts so joined, the same as upon separate indictments, information," etc.

The question is whether the information charges more than one offense, whether the unlawful possession of a still, or the unlawful possession of other equipment or the unlawful possession of the 30 gallons of mash being used in the manufacture of intoxicating liquors are to be considered as separate and distinct crimes, and are re-

quired to be stated in separate counts of the information.

We are convinced that the unlawful ownership, maintenance and possession prohibited and made criminal define and state but one criminal offense. There are two acts made unlawful by this clause. The first is that it shall be unlawful for any person to manufacture any intoxicating liquors, and this is a distinct separate offense, and the second, which is the charge set out in the information, is that it shall be unlawful to own, maintain or have possession of any still or equipment for the manufacture of intoxicating liquor or any mash or intoxicating liquor in any stage of manufacture.

The information in this case charges the defendants with the unlawful possession of a still and of other equipment for, and of 30 gallons of mash being used in, the manufacture of intoxicating liquor. This unlawful possession plainly embraces only one criminal offense and makes the unlawful possession of any still or other equipment and of any mash, etc., the criminal act for which a remedy is intended. It is the unlawful possession of certain things and material which are being used in the manufacture of intoxicating liquor that is the crime. Section 3278, Comp. St. 1922, providing that separate offenses may be set out in separate counts and joined in the same information, is applicable only to distinct, separate offenses, and cannot be considered as authority for the dividing up of one offense and placing each in a separate count. This would place an unreasonable duty upon the county attorney and might work a serious injustice to the defendant.

Plainly the intention of the statute is to make a criminal offense of the unlawful possession of certain equipment and material used for the manufacture of intoxicating liquors, and the change in the stating of the crime in the information from the use of the disjunctive "or" in the statute to the conjunctive "and" in the information is the proper way to allege the offense as to

the unlawful possession of equipment or material used or intended for the manufacture of intoxicating liquors, and it is for the state, upon the trial, to prove beyond a reasonable doubt the existence of the possession of one or more of the things charged to be in the unlawful possession of defendants; by so doing, the defendants are only obliged to meet the one crime contemplated and defined by the law, and, if convicted, can only be punished for the one offense.

The principle is recognized in 1 Bishop, Criminal Procedure (3d. ed.) sec. 436, in which the learned writer uses the following language: "It is common for a statute to declare that, if a person does this, or this, he shall be punished in a way pointed out. Now, if, in a single transaction, he does all the things, he violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore an indictment upon a statute of this kind may allege, in a single count, that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction *and* where the statute has *or*, and it will not be double, and it will be established at the trial by proof of any one of them. Thus, where the allegation was that the defendant sold spirituous liquors, to wit, rum, brandy, whisky, and gin, in less quantities than one quart, without license, the court overruled the objection that four offenses were thereby charged in one count, saying: 'The selling of any of the liquors named would be an offense; but there is no more reason why an offender should be indicted separately for each, than there would be to charge a thief, who had stolen a suit of clothes, in separate counts for the coat, waistcoat, etc.'"

The same general principal has been held by this court in *State v. Leekins*, 81 Neb. 280; *Union P. R. Co. v. State*, 88 Neb. 547; *Lawhead v. State*, 46 Neb. 607.

The action of the district court in overruling defendants' motion to quash the information on the ground

that more than one offense was charged therein was correct.

The next error urged by counsel for defendants is the overruling of the demurrer to the information interposed, the grounds of which were that an offense was not charged. This contention seems without merit, as the information sets forth all the essential elements of the crime and all the averments required by law.

The next objection urged is the overruling of the plea in abatement and bar on the ground that the act enacted as an amendment to the intoxicating liquors law of Nebraska is unlawful for infringing upon the constitutional rights of the defendants and depriving them of certain inalienable rights, among which are life, liberty and the pursuit of happiness. There is no merit in this assignment of error, as this court has held in *Badberg v. State*, 108 Neb. 816, that the law is constitutional.

The next assignment of error is in overruling defendants' motion for separate trials. Section 10130, Comp. St. 1922, grants the right to defendants of separate trials only in cases of felony. The offense charged in the information is a misdemeanor, to which the statute referred to does not apply.

The next assignment of error is in regard to the court's rulings on the admission or exclusion of evidence offered on the trial. An examination of each ruling convinces us that nearly all of them were made by the court in the interests of defendants and for their protection, and that no prejudicial errors were committed.

A further objection is made that the jury were not properly selected, and that the defendants were allowed only three peremptory challenges, and our attention is called to section 10136, Comp. St. 1922, which provides: "If two or more persons be put on trial at the same time, each must be allowed his separate peremptory challenge, and in such cases the attorney prosecuting on behalf of the state shall be allowed such peremptory challenges for each of such defendants as are allowed by

law." The record shows that the jury were duly impaneled and sworn, and, nothing appearing to the contrary, the presumption is that the jury were properly and lawfully selected. This assignment of error is not raised specifically in the motion for new trial, and the transcript fails to disclose any objection by defendants, or either of them, arising because of the mode of selection or sufficiency of the jury. No objection was made to the allowance of peremptory challenges until after the trial and verdict and upon the hearing of the motion for new trial. In a misdemeanor case of this kind the defendants can waive a jury or any or all peremptory challenges. The jury was not waived, but the defendants requested no more than three peremptory challenges; they made no demand under the statute for the allowance to each of his three separate challenges, and this right must be considered as waived. 16 R. C. L. 219, sec. 36, 244, sec. 61, 253, sec. 71; *Gravelly v. State*, 45 Neb. 878; *Morgan v. State*, 51 Neb. 672. The fact appearing in the record that no exceptions were taken to the jury by the defendants indicates that it was a fair and impartial jury, such as the Constitution guarantees to a party. The defendants were tried by a jury to which they took no exceptions, and this in itself should constitute a waiver of further peremptory challenges.

We find no error in any of the instructions given by the court. Each and all of them seem to be proper and to correctly state the law; they cover the different phases of the case and carefully preserve the rights of the defendants. There seems to be no merit in any of the objections raised by the defendants to the instructions given. There appears to be no error in the proceedings of the lower court which amounts to a deprivation of the constitutional rights of the defendants, or of rights which were not and could not be waived, and there has been no substantial miscarriage of justice. *Porter v. State*, 107 Neb. 690.

The sole remaining assignment of error is that the ver-

dict of the jury is not sustained by the evidence and is contrary to law, that such evidence merely raises a suspicion or conjecture of guilt and is not sufficient to support a conviction. Without going into the evidence fully, it appears conclusively that one of the exhibits found in the possession and on the place of the defendants constituted a still; that the equipment and material found upon the premises were sufficient to justify the jury in its belief that the still was upon the premises with the knowledge of both defendants and was there for the purpose of manufacturing intoxicating liquor. The fact that the still was concealed might be considered as evidence by the jury in reaching their conclusion as to the intent of defendants and the purpose for which the still was kept on the premises, and it hardly seems possible that the defendant Noble, without any instructions from defendant Nash, would change the feed of the hogs and upon his own initiative fix up a mixture of mash to be fed to the animals. The jug with the "hootch" smell was also a fact which the jury were entitled to consider.

It is usually quite difficult for officers to apprehend a guilty person in the actual operation of a still in the unlawful manufacture of intoxicating liquor. Such manufacture is a process which requires time. In this particular case the officers apparently arrived when the initial process of manufacture had just started, the mash had been prepared and the grain was soaking. The machinery for the distillation part of the process was at hand and was concealed. The jury might well infer from the actions of the defendants and from the entire surroundings that the still and the mash were in the possession of these defendants for the purpose of manufacturing intoxicating liquor.

Under this evidence there were proper questions of fact to be submitted to the jury and the jury passed upon such questions. There was certainly considerable evidence to go to the jury under the information, and upon such evidence the jury made its finding of the guilt of defend-

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ants. It is not for this court to reconsider the evidence or its weight. The issues of fact were exclusively within the province of the jury to decide, upon a consideration of all the evidence, and we see no reason why the verdict should now be disturbed.

From an examination of the whole record, it appears that the defendants had a fair trial by an impartial and unprejudiced jury, that the propositions of law were properly submitted to the jury by the district court, and that the evidence was sufficient to warrant the verdict of guilty against each defendant. We hold that the proceedings and judgment of the lower court were without prejudicial error and should be affirmed.

AFFIRMED.

STATE, EX REL. CITY OF CHADRON, ET AL., APPELLEES, V.
INTERMOUNTAIN RAILWAY, LIGHT & POWER COMPANY
ET AL., APPELLANTS.

FILED JULY 13, 1923. No. 23266.

1. **Mandamus:** PUBLIC DUTY. A writ of mandamus, with an ancillary injunction to prevent actual, impending or threatened injury, is a proper remedy to compel the performance of a plain public duty, when there is no adequate remedy at law.
2. ———: ———: PUBLIC SERVICE CORPORATION. A court may compel by mandamus the performance of a public duty assumed by a public service corporation in furnishing electrical current to a municipality and its beneficiaries, when from the franchise contract it appears that such duty is plain and unequivocal.
3. **Electricity:** EXCESS RATES: PAYMENT: ESTOPPEL. The payment of a surcharge of 33 1-3 per cent. in addition to the maximum contract rate by the city of Chadron and its inhabitants under threat of shutting off the electrical current, unless the increased rate is paid, will not be construed as a consent to such increased rate or a change of the contract between said city and the public service corporation.

APPEAL from the district court for Dawes county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

J. E. Porter, for appellants.

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J. B. Townsend, Allen G. Fisher and Samuel L. O'Brien, contra.

Heard before MORRISSEY, C. J., LETTON and ALDRICH, JJ., BLACKLEDGE and COLBY, District Judges.

COLBY, District Judge.

This action is an appeal by the respondents, Intermountain Railway, Light & Power Company, a corporation, and Edward N. Libby, from a judgment awarding to the relators, city of Chadron and others, a peremptory writ of mandamus and from the writ issued. In pursuance of the judgment the writ commanded respondents as follows:

"To equip the 59 ornamental light posts or standards comprising the white-way with top light and side lights and globes thereon, and furnish the same with the full amount of electricity called for in the said franchise contract, and to paint the same in substantial compliance with the franchise contract, and to monthly render bills for such fluid supplied at the rate prescribed in the said franchise ordinance without surcharge, and to furnish to Milton B. McDowell and John H. Regan for the operating of their X-ray machine, and all other purchasers of power, residents of the city of Chadron, electricity for power for any and all purposes at the rate of \$1 per H. P. per month and a current rate not exceeding 6 cents, and to furnish every inhabitant now connected with the plant of said respondent or its wire transmission lines electricity for illuminating purposes, and to charge therefor a minimum charge of \$1 per month when not metered, and, when metered, additional current charge up to 20 K. W. H. per month of 12 cents per K. W. H., and to furnish service connections from the feed wires of the respondent company to the owners, also to building of any customer or any resident who shall apply to become a customer, without charge or advances for the said material and without surcharge to any customer or prospective customer."

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It appears from the record that on December 22, 1910, the city of Chadron, a city of the second class, made a contract by ordinance No. 229 of said city with Kass & Klingaman for the use for 20 years of the public places of the city to maintain their system of distribution of electric lights to the city and its citizens, and fixed rates for the city's street lights and for citizens at a 12 cent per kilowatt, monthly, meter rate, and this contract was made binding upon the assigns of Kass & Klingaman. Some years later Kass & Klingaman sold their plant and contract rights to the respondent Intermountain Railway, Light & Power Company, and ordinance No. 287 was passed by the city of Chadron at the request of respondent company, and its terms were accepted in writing by said company. By its terms this contract under ordinance No. 287 was for the period of 25 years from the date of its final passage on January 19, 1917.

It appears that all parties acted upon and carried out the terms of said contract until some time in November, 1918, when the respondent company notified the city of Chadron that it would, on and after said date, collect from the city and all consumers in said city the maximum rates provided for in said ordinances and contract, and in addition thereto a surcharge of 33 1-3 per cent. thereon, and that thereafter and up to the time of the commencement of this action said surcharge was collected from the city and all consumers therein, until stopped by the restraining order issued in this case at the commencement thereof.

Among the first objections made by the respondent is that the district court erred in granting an injunction or restraining order with the writ of mandamus, that the two remedies are inconsistent; and it is contended that an injunction is the proper remedy for the threatened violation of a duty entailing an injury for which the law gives no adequate remedy, while the office of mandamus is to compel the performance of a plain and positive

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duty. It is strenuously urged by respondents' counsel that in this case the relators really seek the specific performance of a contract aided by injunction, and that if the relator is entitled to any relief the remedy is by specific performance and injunction, and not by mandamus.

It is unquestioned that the writ of mandamus is an extraordinary legal remedy and should not be used where there is an adequate remedy at law. Although to a certain extent proceedings by mandamus and by injunction occupy the same field and cover parts of the same ground, yet one of the distinguishing questions presented here at the outset is whether money damages are adequate to compensate the city of Chadron and the public for the failure on the part of the respondent company to carry out the terms of the contract. There is a provision for, and the ordinance requires, a continuity of service in the furnishing of electrical current, and it is very evident that a continued refusal on the part of respondent company to live up to the franchise contract could not be adequately relieved by suits for damages; there would have to be a multiplicity of suits and the public privileges of the city in the lighting of the streets and municipal buildings could not be preserved and the damages from violation adequately reached by legal actions. It appears to us that there is a plain public duty to be performed by the public service corporation arising under the terms of the ordinances and the franchise contract, and that the extraordinary legal remedy of mandamus is the only one which would furnish an adequate remedy and reach the desired object, and it seems to be clear and plain from the facts in the record just what the respondents' duties are to the city and its citizens, and that mandamus is authorized in cases of this kind.

It is also quite generally held that a temporary injunctive order, ancillary and an aid to the writ of mandamus, to prevent an actual or threatened injury, can be issued. In *North Carolina Public Service Co. v.*

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Southern Power Co., 181 N. Car. 356, it is stated by Justice Stacy that the writs of mandamus and injunction may properly aid each other in actions requiring such relief. See *De Lancey v. Piepgras*, 141 N. Y. 88; *Cline v. Whitaker*, 144 Wis. 439, 140 Am. St. Rep. 1039; *Davis v. Mayor*, 1 Duer (N. Y.) 451; *Whigham v. Davis*, 92 Ga. 574.

This court in a number of cases has issued the writ of mandamus in the enforcement of contracts where the duty was plain and of a public nature. *State v. Lincoln Medical College*, 81 Neb. 533; *State v. Missouri P. R. Co.*, 100 Neb. 700; *State v. Dahlman*, 100 Neb. 416. The third paragraph of the syllabus in the latter case is as follows: "The act providing for the consolidation requires the consolidated city to perform all valid, unperformed, subsisting contracts made by the city of South Omaha, and a writ of mandamus to compel such performance was properly issued by the district court."

The general rule seems to be that, when the relator is the beneficiary of a contract, ordinance, franchise or statute, which is of a public nature, the writ should issue. The mandate issued plainly requires the performance of a legal, public duty. and not only is the city of Chadron a proper party, but any and all of the consumers of electrical current and the beneficiaries of such city are interested and may be made parties.

The pleadings upon which this case was submitted to the district court virtually admit the general liabilities, obligations, rights and duties devolving upon the relators and respondents, and the district court had but to apply the established law to the facts in order to come to the conclusions reached and to justify its judgment. It has long been settled by the better judicial authorities that, where there is a grant and acceptance of a public franchise which imposes certain obligations on the corporation to which a franchise is granted, a public duty is imposed upon it, differing from an ordinary contractual duty, and that a writ of mandamus will issue in a proper

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case to compel the performance of such public duty. *Chicago v. Chicago Telephone Co.*, 230 Ill. 157, 12 Ann. Cas. 109, and note, 13 L. R. A. n. s. 1084; *City of Potwin Place v. Topeka R. Co.*, 51 Kan. 609, 37 Am. St. Rep. 312; *Township of Ross v. Michigan U. R. Co.*, 165 Mich. 28, Ann. Cas. 1912C, 885, and note; *State v. St. Paul, M. & M. R. Co.*, 98 Minn. 380, 8 Ann. Cas. 1047, 28 L. R. A. n. s. 298; *State v. St. Paul City R. Co.*, 117 Minn. 316, Ann. Cas. 1913D, 139; *State v. Bridgeton & Millville Traction Co.*, 62 N. J. Law, 592, 45 L. R. A. 837.

Because the respondent company is an assignee or transferee of the franchise, it is not relieved from any burden which inhered in the original or subsequent grants of the franchise, and the court should compel the performance of the legal obligations and duties assumed and contained in such franchise. *Walls v. Strickland*, 174 N. Car. 298; *Mahan v. Michigan Telephone Co.*, 132 Mich. 242; *Yancey v. Batesville Telephone Co.*, 81 Ark. 486, 11 Ann. Cas. 135; *Robbins v. Bangor R. & E. Co.*, 100 Me. 496, 1 L. R. A. n. s. 963; *Godwin v. Telephone Co.*, 136 N. Car. 258, 67 L. R. A. 251, 103 Am. St. Rep. 941, 1 Ann. Cas. 203; *Horner v. Oxford Water & Electric Co.*, 153 N. Car. 538, 138 Am. St. Rep. 681.

The answer and return of the respondent company states, as one of the reasons why the terms of the contract should not be performed on its part, that at the present time such performance is not remunerative or profitable and could only be performed at a loss, but this is not a valid reason under the law.

In *Columbus R. P. & L. Co. v. City of Columbus*, 63 L. ed. 669 (249 U. S. 399) it is held:

"Increased street railway operating costs and decreased net revenues due to war conditions and to an increased wage scale fixed by the national war labor board, though rendering unremunerative the street railway fares fixed by municipal franchise ordinances which, by acceptance, became valid contracts, mutually binding for the twenty-five year term named therein, do not absolve the street railway company from the obligations of its

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contract, so as to justify it in surrendering its franchises and excuse it from giving service at the rates so fixed, especially where it cannot be said that, taking all the years of the term together, the contract will prove unremunerative."

"A municipality acting under state authority, may, by ordinance, make a valid binding contract obligating it to permit the operation of a street railway upon the city streets for twenty-five years, upon the terms and conditions therein set forth."

"If a party charges himself with an obligation possible to be performed, he must abide by it unless performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties will not excuse performance. Where the parties have made no provision for a dispensation, the terms of the contract must prevail."

See, also, 6 R. C. L. 997, sec. 364.

The main facts establishing the obligations and duties between the relators and respondents are not in dispute but are admitted in the pleadings, yet the respondents seek to justify their action in adding a surcharge of 33 1-3 per cent. to the maximum rates provided for in the ordinances on the ground, as stated in their answer, that the company notified the city that it was necessary to have an increase in the rates because the maximum rate had become grossly inadequate and noncompensatory, and also that the city and the public had consented to such increased rate by paying the same from the date of such notice of increase to the time of the commencement of this suit, although it was stated, and it may be reasonably inferred, that such consent or payment was induced by the admitted threat that the current would be turned off and not furnished by the company, unless the surcharge was paid in addition to the regular rates. It occurs to the writer of this opinion that a similar argument of consent might be made in defense of the highway robber who compels his victim at the point of a revolver to turn over his money in order to save his life. Such en-

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forced consent certainly cannot be intelligently held to do away with the public obligations and duties contained in the ordinances and contract entered into and acted upon for years by the city and its beneficiaries, on the one hand, and the public service corporation, on the other. Municipal ordinances and contracts affecting the public are not thus lightly to be abrogated at the will and pleasure of one party without the legal consent of the other, and the writ of mandamus would seem to be the proper remedy to require such corporations to perform the plain public duties which they have assumed.

The decisions of this court and of the courts of the United States generally seem to meet and answer fully all the assignments of error made by appellants. The facts admitted in the pleadings and the best adjudicated cases all unite in authorizing and sustaining the proceedings of the district court, whose judgment should be affirmed.

AFFIRMED.

The following opinion on motion for rehearing was filed April 30, 1924. *Former judgment of affirmance vacated, and judgment of district court reversed.*

1. **Mandamus: PEREMPTORY WRIT.** To justify the issuance of a peremptory writ of mandamus, the alternative writ should state or recite facts showing that compliance with the demands of relators is a specific duty clearly enjoined by law upon respondent.
2. ———: ———. In a proceeding for a peremptory writ of mandamus, it is error to assume unproved facts denied by the answer or return.
3. ———: **DENIAL OF WRIT.** If a peremptory mandamus cannot be granted as prayed, the writ may properly be denied.
4. ———: **ALLOWANCE OF WRIT: ERROR.** On application by a city for a peremptory writ of mandamus requiring a public service corporation to furnish electric currents according to the terms of a city ordinance, a judgment requiring performance of that duty on terms at variance with the ordinance is erroneous.
5. ———: ———: ———. In mandamus to compel a public service corporation to comply with a city ordinance, a writ subjecting an individual respondent to coercive process is erroneous, if the record

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fails to show that he is directed by the writ to perform a specific duty enjoined upon him by law.

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN, DAY and GOOD, JJ.

ROSE, J.

This is an application by the city of Chadron and other relators for a peremptory writ of mandamus requiring the Intermountain Railway, Light & Power Company and Edward N. Libby, respondents, to comply with a contract and city ordinance enjoining upon them the duty to furnish electric currents to the city of Chadron and residents thereof. The writ was allowed, and respondents appealed. Upon a consideration of the appeal the judgment was affirmed. A statement of the case appears in the former opinion and need not be repeated. *State v. Intermountain R., L. & P. Co., ante*, p. 720. Subsequently a reargument was granted on motion of respondents. In the light of new arguments at the bar the case was again submitted and reconsidered.

Some features of the application and judgment, not discussed in the former opinion, seem to require consideration. The alternative writ issued by the district court does not state or recite facts showing that compliance with the demands of relators is a specific duty clearly enjoined by law upon respondents. To justify the issuance of the peremptory writ it was necessary to assume unproved facts denied in the answer. If mandamus cannot be granted as prayed, the writ may properly be denied. In these respects relators failed to comply with principles of law applicable to a proceeding of this kind.

The peremptory writ granted by the district court required respondents to furnish electric currents on terms at variance with those prescribed by the ordinance which relators pleaded as a basis for the relief demanded by them. For this reason the judgment was erroneous.

Furthermore, the record fails to show that the duty to comply with the lighting ordinance and contract was one which the law enjoins upon respondent Libby. It

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follows that the judgment subjecting him to coercive process was erroneous. For the reasons stated, the former judgment on appeal in this case is vacated, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

FRANK H. BROWN, APPELLEE, v. C. R. EASTERDAY ET AL.,
APPELLANTS.

FILED JULY 13, 1923. No. 22481.

1. **Nuisance:** OIL STATION. An oil and gasoline filling station erected in a residence district is not a nuisance *per se*.
2. ———: ———. The storage of gasoline in tanks underground, in strict compliance with an ordinance regulating the same, is not a nuisance *per se*.
3. **Explosives:** STORAGE: PERMIT. Ordinance examined, and *held* not to require the taking out of a permit to store gasoline when done in the manner prescribed.
4. **Nuisance:** INJUNCTION. That the operation of a lawful business will depreciate the value of adjoining property furnishes of itself no ground for injunction; the legal remedy being adequate.
5. ———: ———. The right of an individual to enjoin a public nuisance depends upon his being subjected to an injury, not merely in degree, but in kind, different from that suffered by the general public.
6. **Evidence** examined and found not to show any special injury to plaintiff warranting equitable relief.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Reversed and dismissed.*

Burkett, Wilson, Brown & Wilson, Claude S. Wilson and Albert S. Johnston, for appellants.

T. S. Allen, C. Petrus Peterson and Charles R. Wilke, contra.

Heard before MORRISSEY, C. J., DEAN, DAY and ALDRICH, JJ., COLBY and REDICK, District Judges.

REDICK, District Judge.

The action is to enjoin appellants from erecting a fill-

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ing station for the sale of oils and gasoline to motorists in the manner commonly in use. The plaintiff is the owner of an adjoining lot which he occupies as a private residence; the defendants are the owner of the corner lot and his lessees who propose to operate the station. The grounds upon which the plaintiff bases his right to an injunction are: (1) That defendants are constructing said station in violation of the city ordinance regulating storage tanks for gasoline, a permit therefor having been denied by the city council as against the public safety; and (2) that the filling station is a nuisance; that it deprives plaintiff of the comfortable enjoyment of his property; that it will cause a congestion of automobiles in that vicinity; that the glare of lights will be thrown directly on plaintiff's house; that the apparatus makes disagreeable noises; the fire hazard and rates increased, and the property lessened in value by being rendered uninhabitable for residence.

The city of Lincoln filed a petition of intervention, alleging a city ordinance providing, among other things, "that no underground gasoline tank shall be installed without obtaining a permit from the city council for the installation thereof," and that, notwithstanding a permit was denied defendants, they were proceeding to install such tank, and joins in prayer for injunction.

The answers of defendants admit that the filling station is being erected; that no permit therefor was obtained, but the same was denied; set forth the nature of the improvements contemplated; deny all other allegations of the petition; and allege that plaintiff has an adequate remedy at law.

The lower court granted a temporary injunction, which was made permanent by final decree. and defendants appeal.

It is conceded that the buildings and other improvements, if constructed as proposed, will in every respect comply with the building regulations and ordinances of the city, the objection going only to the fact that de-

defendants are proceeding without a permit to install the tanks. The building ordinance was received in evidence over the objection of irrelevancy by defendants, and considerable space in the briefs on both sides is devoted to a discussion as to its validity; but we do not find it necessary to decide this question, for the reason that the failure to take out the ordinary building permit is not within the allegations of the petitions, which refer only to the "ordinance regulating storage tanks for gasoline." Besides, no building had been started, only a pit for the tanks. Doubtless defendants will apply for and obtain a permit for the buildings before starting upon their erection. Furthermore, the city having refused a permit to install the tanks, defendants were not required to do the useless thing of applying for a permit for the building, the utility of which depended upon the other improvements.

The only questions for discussion then are (1) whether defendants were required to take out a permit to install the gasoline storage tanks; and (2) whether a filling station in the location proposed is a nuisance which an adjoining property owner may enjoy.

The material parts of the ordinance relied upon as requiring a permit to install the tanks are as follows:

"Section 1. It is hereby declared unlawful for any person or corporation to store or keep any coal oil, gasoline, naphtha, benzine, or other like products of petroleum, in quantities of more than five gallons in the city of Lincoln in any other manner than provided for in this ordinance. (Provided this ordinance shall not apply to reservoirs on motor vehicles.)"

Section 2 provides with great particularity the material of which the tanks and pipes shall consist, and the manner of their connection and installation, but contains no word on the subject of a permit until the last paragraph, which is as follows:

"Provided it shall be unlawful for any person, firm or corporation to keep any quantity of such products

exceeding one gallon *in any building* within the fire limits of said city *in any other manner than as above described* without first obtaining a written permit from the chief of the fire department so to do. And provided, further, that such oils may be kept and stored in tanks *otherwise than provided in this ordinance* where such tanks are constructed of iron or steel and coated on the outside with tar or other rust resisting material and are detached and clear from buildings, at least 75 feet distant from any other building, and by obtaining permission from the mayor and council, and storing of any such oils on the *west side of Fourth street* in said city." (Italics are ours.)

We are unable to find in this ordinance any requirement that a permit be taken out when the installation is to be made in the manner described in the first part of section 2, which is the case here. The only condition requiring a permit is when it is desired to keep the oil in some other manner. This is practically conceded by plaintiff's counsel, who "confess that the ordinance could have been drawn in a more clear and satisfactory manner," but contend that the defendants and all others in the city have placed a practical construction thereon by uniformly applying for permits, and heretofore accepting a denial thereof as final. The doctrine of practical construction of statutes is well understood, but it only applies to doubtful or ambiguous statutes, and cannot be resorted to for the purpose of altering or adding to the plain meaning of the words used. *Houghton v. Payne*, 194 U. S. 88; *Studebaker v. Perry*, 184 U. S. 258; *Travelers Ins. Co. v. Fricke*, 94 Wis. 258. There is no ambiguity in the ordinance in question; it simply fails to require a permit except in certain cases, and the exception must be construed as excluding all cases not within its terms. There is no language in the ordinance upon which to found the practical construction suggested. It therefore becomes unnecessary to discuss the power of the city to

deny the permit for reasons of public safety, or the validity of the ordinance.

The other question presents greater difficulty. The decree of the lower court contains no finding on the subject of nuisance, but is based exclusively upon a finding that defendants were "about to erect and install a gasoline filling station and storage tanks * * * without a permit from the city and in violation of the ordinances." So far as the city is concerned, the decree might be justified regardless of the question of nuisance, if a permit were requisite, but the suggestion of nuisance arising from the supposed unlawful character of the act, which we find is not well-founded, is one which a private party is not entitled to make unless he suffers special injury. *Hill v. Pierson*, 45 Neb. 503; *Letherman v. Hauser*, 77 Neb. 731. The question, however, is presented by the pleadings and evidence and should be disposed of for future guidance in similar cases.

Plaintiff's proposition is: "The erection and operation of the filling station and storage tanks is a private nuisance." He cites *Whittemore v. Baxter Laundry Co.*, 181 Mich. 564. In that case defendant proposed to bury two 10,000-gallon tanks for the storage of gasoline at the extreme edge of its property, and at a point farthest away from its own buildings and within 10 feet of plaintiff's residence, and it was shown that they could have been placed at a point removed from proximity to any residence, and no good reason was suggested for not so placing them. The court held that, *under the circumstances*, it constituted a private nuisance. What the holding would have been if defendant had made a *reasonable* use of his own property may be inferred from the concession: "We may grant that the storage of gasoline on premises adjacent to or adjoining the premises of another is not a private nuisance *per se*." We do not think it is seriously contended in the instant case that gasoline stored in the manner prescribed by the ordinance at the place in question is a menace to the safety of

plaintiff and his property; he presented no evidence on the point, while defendants showed by insurance men that the hazard of fire was not thereby increased.

McGregor v. Camden, 47 W. Va. 193, is also cited, which involved the drilling and operating of an oil well, and presents no proper analogy.

Also *O'Hara v. Nelson*, 71 N. J. Eq. 161. This case was decided in 1906, in the pioneer days of automobiles, and restrained the defendant from filling tanks of automobiles inside the building *and from storing automobiles with gasoline in their tanks inside the building*. The development of the automobile as a real necessity of modern life has rendered this decision archaic. To require a car to be drained of gasoline, and run in and out of a garage by hand power, would be an unreasonable restriction on business as now conducted. The defendant had a permit to store 55 gallons *outside* the building, which was frame, while 200 gallons would be in the tanks of the machines stored; great stress was laid upon the fact that the storage was in the building.

We are not prepared to hold as a matter of law that a filling station or the storage of gasoline in the manner proposed is a nuisance.

The plaintiff finally contends that he will be deprived of the comfortable enjoyment of his property by reason of a congestion of automobiles, the glare of lights, and the noise of the apparatus used in operating the station, and that these will constitute a private nuisance. Regarding the increase of traffic, the same reasoning would constitute a popular church a private nuisance, as it is a well known fact that, not only on Sundays, but on other days and nights, when the activities of churches are in progress, automobiles are parked for blocks in all directions and to a certain extent interfere with the quiet enjoyment and privacy of homes in the vicinity, and yet these are but the trivial inconveniences necessarily resulting from changes and improvements growing out of advancing civilization. The same may be said as to the

glare of the lights. These inconveniences are shared by the general public, and the only difference as regards the plaintiff is in the matter of degree, not of kind, and therefore does not constitute a special injury entitling him to an injunction. *Ayers v. Citizens R. Co.*, 83 Neb. 26. As to the disagreeable noises, the evidence does not convince us they are of such a character as to seriously interfere with the plaintiff's comfort and enjoyment of his home. The contention that the plaintiff's property will be reduced in value by the erection of the gasoline station, if true in point of fact, is not of itself ground for equitable interference.

The contention is made that the location in question is in a purely residence district, which should not be invaded for the purpose contemplated. A sufficient answer would seem to be that, in the absence of legislation dividing the city into zones and having a general application to all property within the respective sections, it is not within the power of the courts to interfere with the lawful use of property by the owner. It was held, however, in *Hanes v. Carolina Cadillac Co.*, 176 N. Car. 350 (citing cases), that automobiles being of general use, and public gasoline supply stations being essential, their erection in a residence district is not a nuisance *per se*. Whether or not by reason of the manner of operation of the filling station in question it may become a nuisance calling for equitable cognizance rests in the future, and we express no opinion in that matter. What we do hold is that the evidence is insufficient to sustain a finding that the proposed improvement will necessarily amount to a nuisance. It follows that the judgment of the lower court must be reversed and the case dismissed.

REVERSED AND DISMISSED.

Hughes Co. v. Farmers Union Produce Co.

H. J. HUGHES COMPANY, APPELLEE, v. FARMERS UNION
PRODUCE COMPANY ET AL., APPELLANTS.

FILED JULY 13, 1923. No. 22485.

1. **Corporations:** CORPORATION DE FACTO. To constitute an association of persons a corporation *de facto*, there must exist some color of a corporate franchise under which they are operating.
2. ———: ———: COLOR OF FRANCHISE. To constitute such color, some *bona fide* effort, clearly intended as an attempted compliance with some provision of the statute requisite to a corporate franchise, must be shown.
3. ———: ———: ———. The adoption of articles and perfection of an organization in the usual manner, followed by the holding of meetings and transaction of business in a manner appropriate to a corporation, and the existence of a law under which one might have been formed, are insufficient to constitute a corporation *de facto*, for want of color of franchise, even though the parties intended to incorporate and believed they had done so.
4. ———: ———: ESTOPPEL. A corporation *de facto* cannot be created by estoppel, the only effect of the estoppel being to prevent the question being raised.
5. **Partnership:** PLEADING AND PROOF. Where members of an association are sought to be charged as partners, and the answer is a general denial, the defendants may show that they were a corporation, or may show any fact which tends to dispute the facts necessary for plaintiff to prove, without pleading the same specially.
6. **Estoppel in Pais:** PLEADING. In order to let in evidence of an estoppel *in pais*, the facts constituting the same must be pleaded; such an estoppel cannot be shown under a general denial.

APPEAL from the district court for Franklin county:
LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

Bernard McNeny, for appellants.

Stout, Rose, Wells & Martin and *Frank J. Munday*,
contra.

Heard before MORRISSEY, C. J., GOOD, J., COLBY and
REDICK, District Judges.

REDICK, District Judge.

Action upon certain accounts by plaintiff against defendants seeking to charge them as partners in an unincorporated association doing business as Farmers

Union Produce Company. There was judgment against defendants individually, and they appeal. There is no dispute as to the amount due plaintiff, the only contentions of defendants being (1) that they constituted a corporation *de facto*, and (2) that plaintiff is estopped to question their corporate character and claim an individual liability.

Plaintiff produced certificates from the secretary of state and county clerk to the effect that no articles of incorporation had been filed by Farmers Union Produce Company, and evidence showing certain of defendants to be members of the association, and rested.

Defendants then introduced record of a meeting held October 5, 1918, showing the adoption of "Constitution and By-Laws" of "Farmers Union Produce Company." This document contains no declaration of an intention to form a corporation—the company being called an association—the only reference to a corporation being a provision for amendment of "the articles of incorporation" in article LV, sec. 4. The original document was not produced, the evidence fails to show it was ever signed or acknowledged, and no copy was ever filed anywhere. An effort was made to identify exhibit 1 as the articles of incorporation, but the witnesses who signed it were evidently mistaken as to the document. It appears that exhibit 1 was prepared sometime in April, 1919, for a different purpose, and a comparison with the articles in the record book of the company demonstrates that the latter is not a copy of the former, the word "corporation" in the later document being substituted for the word "association" in the earlier one. Exhibit 1 was never acknowledged nor filed. An organization similar to that of a corporation was effected, however, by the election of a board of directors, and officers of the company, meetings were held and minutes kept in a crude sort of way; and, while the question is not free from doubt, it may be assumed that the parties attempted to form a corporation and believed they had done so. The

business was carried on in the name of "Farmers Union Produce Company" and all letters and statements from plaintiff were so addressed. The case of plaintiff is not grounded upon any fraud or holding out as partners; it seems to have dealt with defendants without any investigation as to their legal status as an association; and their position is that defendants are neither a corporation *de jure* nor *de facto*, and therefore they are liable as partners. That they are not a corporation *de jure* is conceded, so the question is whether under the evidence they were one *de facto*.

The answer was a general denial; and plaintiff contends that the question is not thereby presented; but the allegation of the petition is that they were an unincorporated association, and a general denial is sufficient to let in proof of no association or any other kind of an association to rebut that statement. This is not a special matter of defense that must be pleaded, but is a fact which tends to disprove the allegation of the petition by showing a situation inconsistent therewith. If the allegation was that defendant was a citizen of the United States, under a general denial defendant could show that he was born in Germany and had never been naturalized, for such facts meet directly the charge of the petition. Any evidence which tends directly to contradict the allegations of a pleading to which it is interposed is admissible under a general denial. *Wiedeman v. Hedges*, 63 Neb. 103; *Broadwater v. Jacoby*, 19 Neb. 77; *Hanson v. Diamond Iron Mining Co.*, 87 Minn. 505; *Bolton v. Missouri P. R. Co.*, 172 Mo. 92.

Were the defendants a corporation *de facto*? In *Abbott v. Omaha Smelting & Refining Co.*, 4 Neb. 416, it was shown that the organization of the company was in all respects in conformity with the requirements of the law except that it had not filed its articles with the county clerk, and that it did business as a corporation, and evidence was offered that plaintiff transacted business with and recognized defendant as a corporation.

It was said that to establish a *de facto* corporation "it is necessary to show user of a corporate franchise," and before any franchise could exist the articles must be filed. "If the mere act of organization by the individuals conferred the corporate franchise, why should the statute require the articles to be filed and recorded in the office of the county clerk as a prerequisite to corporate existence?" "Hence, if the acts and proceedings of a company or association consist only of such acts and proceedings as might be performed without an incorporating act, or corporate grant or franchise, a corporation cannot be inferred from such acts"—citing *Greene v. Dennis*, 6 Conn. 293. The syllabus of the *Abbott* case, "To establish the existence of a corporation *de facto*, a charter or some law under which the assumed powers are claimed to be conferred, and user of the franchise thereby obtained, must be shown," omits the element of an attempt, at least colorable, to comply with the statute, but the opinion and the cases cited recognize the necessity of such an attempt, as by filing the articles. The rule was more fully and accurately stated in *Lusk v. Riggs*, 70 Neb. 718: "Where the law authorizes a corporation and there has been an attempt in good faith to organize, and the requirements of the statute have been colorably complied with and corporate functions thereafter exercised, there exists a corporation *de facto*, which cannot ordinarily be called in question collaterally."

There is some apparent difference of opinion as to what facts are necessary to be shown to establish the existence of a corporation *de facto*, and it is not intended to hold that the filing of the articles is the only act which will authorize the requisite inference, but the authorities are practically unanimous upon the point that there must be some color of a corporate franchise before even an inference of such a corporation is permissible; and to acquire this requisite color, some effort, springing directly from its requirements, must have been made to comply with the statute. This does not mean a substantial

compliance, because that is all that is requisite for a corporation *de jure*, as suggested in *Finnegan v. Noerenberg*, 52 Minn. 239, and it is there stated: "But there must be an apparent attempt to perfect an organization under the law. There being such apparent attempt to perfect an organization, the failure to comply with some substantial requirement will prevent the body being a corporation *de jure*; but if there be user pursuant to such attempted organization, it will not prevent it being a corporation *de facto*"—citing cases. This case clearly distinguishes between persons acting with and those acting without color of organization, and holds that the mere existence of a law under which a corporation *might* be formed, unaccompanied by any attempt to do anything required thereby looking toward a franchise, will not satisfy the requirement of a colorable compliance, to support a claim of a *de facto* corporation. The reasoning of this case is convincing.

In *Abbott v. Omaha Smelting & Refining Co.*, *supra*, it was said: "'Organization' * * * means simply the process of forming and arranging into suitable disposition the parts which are to act together in, and in defining the objects of, the compound body, and that this process, even when completed in all its parts, does not confer the franchise, either valid or defective, but, on the contrary, it is only the act of the individuals, and therefore something else must be done to secure the franchise."

These acts necessarily precede the filing of the articles, which is the first step to initiate a franchise. Up to the filing of the articles the power and authority of the state is not invoked, and the body has not received the breath of life necessary to its existence as a legal entity, defective or perfect. That case has never been criticised, so far as we are advised, but has been cited with approval many times in this and other states. The cases of *Haas v. Bank of Commerce*, 41 Neb. 756, *Lusk v. Riggs*, 70 Neb. 718, and *Kleckner v. Turk*, 45 Neb. 187, were all

cases where the articles had been filed, and do not criticise the *Abbott* case, but distinguish it. *Globe Publishing Co. v. State Bank*, 41 Neb. 175, involved the liability of stockholders of a *de jure* corporation before exhausting the remedies against the corporation. In *Hogue v. Capital Nat. Bank*, 47 Neb. 929, the existence of a corporation *de facto* was assumed. In *Otoe County Fair & Driving Park Ass'n v. Doman*, 1 Neb. (Unof.) 179, the facts are not given; but it is stated that the persons acted under color of authority and were therefore a *de facto* corporation. In *Livingston Loan & Building Ass'n v. Drummond*, 49 Neb. 200, the objection was that the articles of incorporation were not signed by a sufficient number of persons, and it was held defendant was prohibited by statute from raising the question. None of these cases holds that a *bona fide* effort to comply with the statute is not necessary, but when the question is discussed that doctrine is affirmed.

In the case at bar no step was taken which gave defendants any color of right to a corporate franchise. The most that can be said is that they prepared to secure a franchise, but stopped short of any act which would secure their purpose.

The following cases cited by appellants do not apply for the reasons noted: In *Swofford Bros. D. G. Co. v. Owen*, 37 Okla. 616, *Snider's Sons' Co. v. Troy*, 91 Ala. 224, and *Slocum v. Head*, 105 Wis. 431 articles were filed; in *Jennings v. Dark*, 175 Ind. 332, a colorable attempt was made to incorporate under an act of 1850, and the company was recognized as a *de facto* corporation by act of the legislature changing its name; in *Mason v. Stevens*, 16 S. Dak. 320, there was legislative recognition as a *de facto* corporation; in *Whipple v. Tuxworth*, 81 Ark. 391, an improvement district was to be incorporated by filing a petition, which was filed, and objections were to the qualifications of the signers. Only one case has been called to our attention in anyway intimating that a corporation *de facto* may exist without color of authority,

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Magnolia Shingle Co. v. Zimmer's Co., 3 Ala. App. 578, but the holding there was upon the ground of estoppel.

Our conclusion is that defendants are not entitled to claim that they are a corporation *de facto*, and we are supported by the following additional authorities: *Harrell v. Davis*, 168 Fed. 187; 1 Fletcher, *Cyclopedia of Corporations*, secs. 289, 290, 294, 298, 303.

It is contended, however, that, the plaintiff having dealt with defendants as a corporation, it is estopped from now questioning its corporate character. The answer was a general denial and, therefore, this defense is not available. *Burwell Irrigation Co. v. Lashmett*, 59 Neb. 605; *Henderson & Co. v. Keutzer*, 56 Neb. 460; *Scroggin v. Johnston*, 45 Neb. 714. These cases and many others in this state hold that the facts constituting an estoppel *in pais* must be specially pleaded; this is the general rule.

AFFIRMED.

ANTON LENNEMANN, APPELLANT, v. HARLAN
COUNTY, APPELLEE.

FILED JULY 13, 1923. No. 22501.

Taxation: UNAUTHORIZED LEVY: REMEDY. The remedy to recover taxes paid on the ground that they were levied for an unauthorized purpose must be pursued against the political subdivision for whose benefit or at whose request the same were levied, as provided by subdivision 2, sec. 6491, Rev. St. 1913; and where such taxes were levied by the county for the benefit of a township, the county is not liable therefor.

APPEAL from the district court for Harlan county:
LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

B. B. Webber and J. G. Thompson, for appellant.

L. D. Hunt, *contra*.

Heard before MORRISSEY, C. J., LETTON and GOOD, JJ.,
COLBY and REDICK, District Judges.

REDICK, District Judge.

Plaintiff appeals from judgment of the district court

affirming an order of the county board disallowing a claim for recovery of taxes paid under protest. The tax was levied by the county board at the request of the authorities of Orleans township, Harlan county, for library purposes. Plaintiff alleges: "That the said levy of five mills for library purposes is illegal, and is not a valid levy * * * for the reason that the electors of said township of Orleans have never voted to establish or maintain a public library as provided by the statutes of Nebraska." A demurrer to the petition was sustained and the case dismissed by the lower court.

Only one question is presented: Is the action properly brought under subdivision 1, sec. 6491, Rev. St. 1913 (Comp. St. 1922, sec. 6018), against the county, or should it have been brought under subdivision 2 against the township? So far as material to our present inquiry the provisions are as follows:

"First. If such person claim a tax, or any part thereof, to be invalid for the reason that the property upon which it is levied was not liable for taxation, or that the property has been twice assessed, * * * he may pay such taxes under protest"—and recover the same from the county.

"Second. If such person claim the tax, or any part thereof, to be invalid for the reason that it was levied or assessed for an illegal or unauthorized purpose, or for any other reason except as hereinbefore set forth, when he shall have paid the same to the treasurer, or other proper authority"—he may recover the same from the county, city, village, township, district, or other subdivision, for the benefit or under the authority or by the request of which the same was levied.

In *Darr v. Dawson County*, 93 Neb. 93, we held that the remedy provided by the first subdivision is available only when the property was wrongfully assessed, either because exempt from taxation or because the tax levied had already been assessed thereon and paid. This case was followed in *Janike v. Butler County*, 103 Neb. 865.

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We think, in view of the fact that all property is "liable to taxation" except that which is expressly exempted, that the construction placed upon the words quoted is correct, and that for recovery for taxes paid, illegal for any other reason, the remedy must be sought under the second subdivision. The taxes in question are claimed to be illegal for the reason that they were levied for a purpose not authorized by the township, which brings them clearly within the words of the second subdivision. In a sense property is not liable for taxation for an unauthorized purpose, but the statute clearly distinguishes between such levies and levies upon property not taxable for any purpose, and has provided distinct remedies for each situation.

We are of opinion that the action should have been brought against the township of Orleans, and that the judgment of the lower court in sustaining the demurrer was correct, and it is

AFFIRMED.

RICHARD HIBBERD ET AL., APPELLEES, V. JAMES A. HUGHEY, APPELLANT.

FILED JULY 13, 1923. No. 23412.

1. **Master and Servant:** DEPARTURE FROM EMPLOYMENT. Mere disobedience by the servant of the master's order regarding the manner in which work is to be performed will not operate to remove the servant from the sphere of his duties.
2. ———: ———. Disobedience of a positive order as to the place where work is to be performed, resulting in injury to the servant arising out of the place selected by him, constitutes a departure from his employment, and such injury cannot be said to "arise out of and in the course of" his employment within the meaning of the employers' liability law.
3. **Evidence** examined, and *held* to support the finding of the district court.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Drake & Drake, for appellant.

W. D. Oldham and W. E. Balcom, contra.

Heard before MORRISSEY, C. J., LETTON and GOOD, JJ.,
BLACKLEDGE, COLBY and REDICK, District Judges.

REDICK, District Judge.

Appellant was allowed compensation by the commissioner, but the award was set aside by the district court, and from that judgment claimant appeals.

The facts are that appellant was in the employ of Hibberd Brick Company engaged in the construction of a brick building for appellee Brigham. No insurance was procured by the contractors and so the owner is joined. Appellant was employed as a common laborer and his work just before the accident was carrying mud boards from one part of the building to another, on the second floor. A material hoist was being installed, consisting of two cages balancing each other and connected by a cable passing over a pulley or drum, and so arranged that when one cage was up the other would be down. The work had progressed to a point where it was necessary to adjust the position of the cages so that when they were at rest material could be wheeled on and off at the floor levels. The cage at the second floor had become lodged at a point several inches above the floor and it was necessary to jar it down even with, but not below, the floor. The floors had not been laid, so the spaces were open between the joists on the first and second stories. Charlie Hibberd, one of the appellees, from the first floor called to appellant to bring the elevator down level with the second floor (just what the order was is in dispute and will be discussed later). Appellant put his foot on it, but was unable to move it, and then stepped into the cage and jumped on it, with the result that the cable slipped through the clamps by which it was attached to the cage, and it was precipitated with appellant into the basement, a distance of 16 to 20 feet, and appellant was injured.

The claim of appellees is that prior to the accident all

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employees were ordered to keep off the elevator, and that in giving the order to appellant he expressly told him not to get on it; and two questions are presented: (1) Did the injuries to Hughey arise out of and in the course of the employment? (2) Was Hughey guilty of wilful negligence barring compensation?

The lower court answered the first question in the negative and the second in the affirmative.

The elevator was being installed; it had not been in use prior to the accident; the floor of the cage was a short distance above the floor of the second story; it was necessary to have the floor of the cage level with the second floor of the building so that the other cage could be so adjusted that it would be on a level with the first floor; the manner of doing this is not described, but it seems clear that, as one cage balanced the other, their relative positions were governed by the length of the cable connecting them, which being determined, the cable would be attached to the top of the respective cages. When operated therefore, one cage would always be at the first floor and the other at the second. The operation appellant was required to accomplish was to lower the cage to the second floor level—not below it. To accomplish this it is evident that it would be necessary to withdraw the force applied for the purpose, as soon as the cage had descended to the proper place. There was no mechanism provided for stopping the cages; they were to be operated by electricity, which had not been attached; they were not for workmen to ride in. How appellant could have expected the cage to stop at the point desired with the moving force of his own weight still operating is difficult to understand. True, he may have thought the cage would stop when the cable became taut, but the cable was the very thing which was being adjusted, and he had no reason to suppose that the cable was just the proper length—quite the reverse.

We have, up to this point, a servant adopting a method of accomplishing the result desired by the master,

which, at most, *might* be successful, but which, owing to the nature of the case, probably would not be. The general rule is that an injury arises out of his employment when the servant is performing some service for the master, although in a *manner* contrary to his instructions; and this because he is acting within the scope of his employment and his departure from instructions were mere acts of disobedience.

There is evidence in the record, however, that appellant was directed not to get onto the elevator at the very time he was told to lower it to the floor level. If this fact is proved, then another element enters the problem, viz., that the servant was disobedient as to the place he should perform his work.

In *Gacesa v. Consumers Power Co.*, 220 Mich 338, after a discussion of cases, the rule in England was said to be: "Where the employee violates instructions as to the manner in which he is to perform his labor, he is not thereby removed from the sphere of his employment, and that if he is injured the accident arises out of and in the course of his employment, that where the employee violates his instructions as to the place in which he is to perform his labor he thereby removes himself from the sphere of his employment, and if there injured such accident does not arise out of and in the course of his employment"—and the same was adopted by the court as correct. In that case the employee had disobeyed the order of his employer to report each day for instructions as to the day's work, and went to work at a place different from the one he had worked the day before, and received injuries arising out of the place where he worked; and the rule was applied that, by his disobedience of the order, he had removed himself from the sphere of his employment.

In *Fournier's Case*, 120 Me. 236, the servant, for a purpose connected with his duties, attempted to enter the second story of a warehouse through a trap-door by means of a rope operated by a hoisting engine, and was

injured. He and other servants had received orders not to use the rope for that purpose, and the court, by Wilson, J., in holding that he did not receive his injuries "in the course of" his employment, said:

"The words 'in the course of the employment' relate to the time, place and circumstances under which the accident takes place. An accident arises in the course of the employment when it occurs within the period of the employment at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties or engaged in doing something incidental thereto. *Westman's Case*, 118 Me. 133; *Larke v. Hancock Mutual Life Ins. Co.*, 90 Conn. 303; *Bryant v. Fissell*, 84 N. J. Law, 72; *Dietzen Co. v. Industrial Board*, 279 Ill. 11.

"If, then, the employee is in a place where he is prohibited from being by positive orders of his employer by reason of the danger, or has taken a certain course in going from one place to another which he is prohibited from taking by his employer for the same reason, notwithstanding it is within the period of his employment and his purpose in going to the other place is to perform some of his duties he is engaged to perform, he cannot be said, while in the forbidden place or while going by the forbidden route or means, to be acting in the course of his employment within the meaning of the compensation act, because he is not in a place where he reasonably may be in the performance of any of his duties. *Nelson R. R. Construction Co. v. Industrial Commission*, 286 Ill. 632; *Powell v. Bryndu Colliery Co.*, 5 B. W. C. C. 124; *Barnes v. Nunnery Colliery Co.*, 5 B. W. C. C. 195; *Borin's Case*, 227 Mass. 452; *United Disposal Co. v. Industrial Commission*, 291 Ill. 480; *McDaid v. Steel*, 4 B. W. C. C. 412. Of course, if he went to the forbidden place for a purpose not connected with his duties, *a fortiori* would he be outside the course of his employment. If, however, he is in the place where his duties are intended to be performed and where, of course, he

reasonably may be, and is engaged in the performance of them and only violates some rule relating to his conduct while in such performance, he is still acting in the course of his employment, even though he performs them recklessly and knowingly exposes himself to danger in violation of orders, and, unless the injury can be said to have been inflicted by 'wilful intention,' may recover compensation.

"The claimant in this case was not in a place where he reasonably might be when the accident occurred. He had taken a forbidden way. He was as much in a forbidden place where he could not reasonably be, when he was dangling at the end of a swinging rope between the floors of the building where he was working, as he would have been had he, in order to save time in going to some part of the employer's premises where his next duties were to be performed, passed through a transformer chamber full of high-tension wires, which he was forbidden to enter. He took the forbidden course for his own convenience and not that of the master."

In *Borin's Case*, 227 Mass. 452, the windows of one side of the room where claimant was employed had been nailed down so that the employees would not be climbing over vats of steaming dye to open them. Claimant took a hammer and chisel to pry open one of the windows and received an injury from a splinter from the chisel, and it was held that, as the employee was upon a forbidden part of the premises, the accident did not arise out of the employment; "the fastened window spoke as plainly to him that it was to remain closed as if a printed notice had been posted, or an oral order had been given, the intentional violation of which ordinarily would have precluded compensation."

In *Haas v. Kansas City Light & Power Co.*, 109 Kan. 197, an oiler of machinery went into a room of the building in which he had no duty to perform and received an electric shock. In *re Jenczewski*, 199 App. Div. (N. Y.) 156, compensation was denied for the reason that the

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employee, at the time of his injury, was violating his instructions as to the place where he was to work, and was therefore outside the sphere of his employment. In *Reimers v. Proctor Publishing Co.*, 85 N. J. Law, 441, compensation was denied because the employee whose duty was to deliver papers had taken an automobile for the purpose, contrary to express instructions.

The question as related to the place of employment, whether or not the employee's injuries arose out of and in the course of the employment, presents some difficulty in the absence of special instructions. In such cases it seems a wide discretion rests with the servant. The following cases are illustrative of the principle: *Christensen v. Hauff Bros.*, 193 Ia. 1084; *Decatur R. & L. Co. v. Industrial Board*, 276 Ill. 472; *White v. Industrial Commission*, 167 Wis. 483; *Clem v. Chalmers Motor Co.*, 178 Mich. 340; *McCrory v. Wolff*, 109 Neb. 796. In none of these cases was there any prohibition of the particular act which caused the injury. In *Bryant v. Fissell*, 84 N. J. Law, 72, it was said: "An accident arises 'in the course of the employment' if it occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time." The court quotes with approval from *Fitzgerald v. Clarke & Son*, 2 K. B. (Eng.) 796: "The words 'out of' point to the origin or cause of the accident; the words 'in the course of' to the time, place, and circumstances under which the accident takes place."

It may be conceded that, if the command of the master had been without any restriction as to the place where the desired operation was to be performed, and claimant had acted as he did, his act might be considered as within the scope and course of his employment, and the only question would be whether he was guilty of wilful negligence, for in such case the servant would be invested with a reasonable discretion in the selection of the precise place at which the particular service might

best be performed but where the place is designated, or a certain place forbidden, the servant has no discretion. Suppose a wall of a building is to be pulled down, and a servant, being ordered to attach a rope thereto, for that purpose goes upon the roof of the building and is injured by the collapse thereof, it could not be claimed that he was not within the sphere of his employment; but if the order was accompanied by a prohibition against going upon the roof, there seems no doubt but that his disobedience would take him without such sphere; he was at a place where he had no right to be in the performance of the work assigned to him. The prohibition in the supposed case, as in the one under consideration, went further than as respected the *manner* of doing the work, and touched the place where the servant should be. True, the claimant's weight upon the cage would tend to send it down, and to that extent may be considered a manner of doing the work; but this loses sight of the consideration as a part of the operation that the cage must be stopped at the floor level, and, as already suggested, this essential feature could not be accomplished in the manner attempted; and so, even in the absence of the prohibition, it might be a debatable question whether the servant was in a place where he could reasonably be expected to be, and therefore within the sphere of his employment; but it seems quite inadmissible to conclude that he was in a place reasonable to be expected in the face of a positive prohibition. The fact that he was actually attempting to perform a service for the master is not conclusive; in all of the following cases that fact was present: *Plumb v. Cobden Flour Mills Co.*, 7 B. R. C. (Eng.) 128, 51 Scottish L. R. 861; *Cook v. London & S. W. R. Co.*, 14 B. W. C. C. 100; *Jackson v. Canadian P. R. Co.*, 12 Sask. L. R. 433; *Kolaszynski v. Klie*, 91 N. J. Law, 37; *Bischoff v. American Car & Foundry Co.*, 190 Mich. 229; *Reimers v. Proctor Publishing Co.*, *supra*.

Compensation is not denied merely as a penalty for

Hibberd v. Hughey.

disobedience of the order, but because the servant has put himself in a place which the master has not provided, and, therefore, an injury occurring at and growing out of defects of that place cannot be said to arise out of or in the course of the employment.

The evidence is conflicting as to whether or not claimant was ordered not to get upon the hoist at the time he was told to bring it down to the floor level; but there is not only ample evidence to support the finding of the lower court that he was so ordered, and under the rule in *Urak v. Morris & Co.*, 107 Neb. 411, and *Swift & Co. v. Prince*, 106 Neb. 358, the same will not be disturbed, but the clear weight of the evidence independently considered supports the finding. The reason the master had for ordering Hughey not to get upon the hoist, whether it would drive the hoist below the level of the second floor or because it was not to be used as a carrier of passengers, is not important. It might have some bearing upon the question of negligence of the master, but in these cases that matter is not material.

We conclude that the injury to claimant did not arise out of and in the course of the employment, and it will not be necessary to discuss the question of wilful negligence.

The judgment is

AFFIRMED.

CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA
SEPTEMBER TERM, 1923

**ATLAS REFINING CORPORATION, APPELLANT, v. JOSEPH
H. VAUGHAN ET AL., APPELLEES.**

FILED SEPTEMBER 22, 1923. No. 22400.

- 1 **Parol evidence** is inadmissible to vary or contradict the unambiguous terms of a valid contract in writing.
2. **Contracts: RESCISSION.** A rescission in definite terms by mutual agreement in writing may substitute a new contract for the old.
3. ———: ———. A written agreement rescinding a sale and prescribing definite terms of rescission without reserving existing obligations, rights and remedies may prevent a recovery for damages or items of indebtedness resulting from a failure to comply with the terms of the original contract.
4. **Sales: RESCISSION: DAMAGES.** In an action to recover the amount which vendors agreed to pay vendee upon a written contract rescinding sale and reconveying the property, the contract of rescission set out in the opinion, under the circumstances narrated therein, *held* to prevent vendors from recovering on a cross-petition the amount claimed to be due them from vendee for debts created before the rescission.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Reversed, with directions.*
Fawcett & Mockett and Harry A. Reese, for appellant.
Burkett, Wilson, Brown & Wilson, contra.

Heard before **MORRISSEY, C. J., ROSE, ALDRICH and
GOOD, JJ., BEGLEY, District Judge.**

PER CURIAM.

This is an action by the Atlas Refining Corporation, plaintiff, to recover from Joseph H. Vaughan and Jacob C. Vaughan, partners, doing business as J. H. Vaughan &

Son, defendants, \$13,831.68, according to the terms of a written contract rescinding a sale of oil stations at Alliance and Antioch. Defendants had owned and operated the oil stations and plaintiff had purchased them. The parties contracted in writing September 4, 1920, to rescind the sale, defendants agreeing to take back oil stations, to pay plaintiff \$8,640 for improvements made by it and \$5,191.68 for merchandise on hand August 30 and 31, 1920, as shown by an inventory. The claim pleaded by plaintiff consists of these two items.

Defendants admitted the execution of the contract rescinding the sale and their liability for improvements and merchandise aggregating \$13,831.68, but filed a cross-petition pleading an itemized indebtedness of \$25,727.64 due from plaintiff to defendants, a credit of \$17,231.68, and demanding judgment for the difference, or \$8,495.96. The indebtedness pleaded by defendants consisted of charges for equipping an additional oil station at Hemingford; for trucks used in distributing oils; for debts assumed by plaintiff; for depreciation in the value of property; for salaries and expenses of defendants, while in the employ of plaintiff, and for other enumerated items.

In an answer to the cross-petition plaintiff pleaded that all matters and differences between the parties had been adjusted and settled by the contract rescinding the sale.

The trial court admitted proof tending to show that the items of indebtedness pleaded in the cross-petition were not included in the rescission or settlement and permitted the jury to find in favor of defendants on that issue. As a result the verdict contained findings that defendants were indebted to plaintiff in the sum of \$13,831.68, that plaintiff owed defendants \$22,327.64, and that the latter were entitled to recover the difference, or \$8,495.96, which, with interest, amounted to \$9,105.52. To prevent a new trial defendants remitted from the verdict \$3,882.50, and from a judgment in their favor for \$5,223.02, plaintiff appealed.

Did the contract rescinding the sale settle the items of indebtedness pleaded in the cross-petition of defendants? This is the question presented by the appeal. The circumstances attending the rescission are material to the inquiry and involved negotiations between defendants and three corporations. When defendants owned and operated the oil stations at Alliance and Antioch, they entered into a contract April 23, 1919, to sell them to the Reliance Refining Corporation of Delaware, the latter agreeing to issue therefor \$3,000 shares of its capital stock, to pay \$26,500 in cash in instalments by November 24, 1919, and \$5,191.68 by January 24, 1920, for merchandise on hand, as disclosed by an inventory. The Reliance Refining Corporation did not comply with any of the terms of its purchase. In connection with the oil stations at Alliance and Antioch another one was established at Hemingford. With the consent of defendants, plaintiff purchased the assets of the Reliance Refining Corporation and assumed the obligations of the latter under its contract to purchase from defendants their oil stations at Alliance and Antioch. In this state of affairs plaintiff and defendants entered into a contract of which the following is a copy:

"At a directors' meeting of the Atlas Refining Corporation held September 4, 1920, the sale of the J. H. Vaughan & Son oil stations was considered, and, owing to a failure on the part of the Atlas Refining Corporation in obtaining a permit to sell or issue stock of said company, said company is unable to carry out its contract with J. H. Vaughan & Son; and J. H. Vaughan & Son are desirous of rescinding said contract, and have heretofore and do hereby demand a rescission of said contract of the sale of said stations at Alliance, Antioch and Hemingford; and said J. H. Vaughan & Son hereby tender back to the Atlas Refining Corporation \$30,000 of the capital stock of the Atlas Refining Corporation and return to said company, \$8,640 put into said stations by the Atlas Refining Corporation; and said J. H. Vaughan &

Son also agree to pay the Atlas Refining Corporation the invoice price of all merchandise on hand on the 30th and 31st days of August, 1920; and the Atlas Refining Corporation by good and sufficient bill of sale is to convey all interest of the Atlas Refining Corporation in and to said properties.

"The Reliance Refining Corporation of Delaware claimed some right in a certain contract with J. H. Vaughan & Son for the sale and purchase of the above oil stations, but said Reliance Refining Corporation have heretofore waived and disclaimed any right in any contract with said J. H. Vaughan & Son for the reason that they were unable to carry out the conditions of the same.

"With the assent of the holders of two-thirds of all the capital stock of the corporation issued and outstanding and by authority of the board of directors now in session, the said board of directors hereby consent to the rescission of the contract between J. H. Vaughan & Son and the Atlas Refining Corporation and hereby, as a board of directors, rescind said contract, on the conditions hereinbefore set forth, by putting each party in the same plight that they were formerly in, and the board of directors by this resolution hereby authorizes the officers of the Atlas Refining Corporation and instruct them by good and sufficient bill of sale or any other instrument in writing that may be necessary to convey back all title, claim or interest that the Atlas Refining Corporation may have claim in and to the oil properties of J. H. Vaughan & Son at Alliance, Antioch and Hemingford, Nebraska, so that said J. H. Vaughan & Son shall have said properties free and clear of any claim or claims of the Atlas Refining Corporation.

"September 4, 1920.

"I hereby accept the terms and conditions of the foregoing resolution and we are accepting bill of sale under said conditions and agree to carry out the terms thereof and attach this to said resolution and make it a part thereof.

"J. H. Vaughan & Son, by J. H. Vaughan.

"J. C. Vaughan."

Does this contract defeat a recovery for the items of indebtedness enumerated and described in the cross-petition of defendants? They were stockholders and officers in both the Reliance Refining Corporation and the Atlas Refining Corporation. In the negotiations resulting in the sale of the oil stations to the former, in the obligations assumed by the latter as successor and in the contract of rescission, defendants not only acted for themselves but were at the time interested financially and officially in the corporations. In addition, they were experienced in business affairs and had been conducting oil stations for several years. There is no evidence to sustain a finding that they were induced by fraud to sign the contract of rescission or that they did not understand its terms. There is no reason to construe the circumstances or the writings in their favor.

From the date of the purchase by plaintiff until the sale was rescinded defendants managed the oil stations without making substantial profits for plaintiff, their employer. They knew plaintiff could not perform its contract of purchase after investing in the enterprise \$8,640, and keeping on hand merchandise inventoried at \$5,191.68. They wanted the oil stations back, and before plaintiff made any reconveyance to them they had entered into an agreement to sell the properties to the Mutual Oil Company. They met September 4, 1920, with the other officers of plaintiff to make a settlement. At that meeting the claims pleaded in the cross-petition were discussed, including salaries. Any indebtedness of plaintiff to defendants was then due. Depreciation by use of the personal property to be reconveyed had already taken place. Monthly salaries claimed by defendants had not been demanded or collected when due. Defendants, now pleading that plaintiff owed them \$8,495.96 September 4, 1920, then agreed to pay plaintiff \$13,831.68,

without reserving in the terms of rescission the items enumerated in their counterclaim. Knowing that plaintiff could not pay for the oil stations while operating them as owner, defendants are in the attitude of having relied on plaintiff to pay its indebtedness to them after it divested itself of property regarded as security. The counterclaim of defendants is inconsistent with their written instrument. Parol evidence is inadmissible to contradict the unambiguous terms of a valid contract in writing. A new contract was substituted for the old. The rescission did not provide for payment of damages for breach of the contract of purchase. No provision was made in writing for reserving debts or damages as liabilities of plaintiff. On the contrary, defendants agreed to accept a bill of sale, or a reconveyance, under the conditions prescribed in the contract of rescission. The conditions therein did not include payment of the items pleaded in the cross-petition. The terms of rescission clearly excluded those items. To allow them is to vary an unambiguous contract and to unsettle by parol a settlement deliberately made in writing. A written agreement rescinding a sale and prescribing definite terms of rescission without reserving existing obligations, rights and remedies may prevent a recovery for damages or items of indebtedness resulting from a failure to comply with the terms of the original contract. Plaintiff reconveyed the property purchased and otherwise complied with the terms of the rescission. Defendants accepted the bill of sale and promptly transferred the property to the Mutual Oil Company, but violated its agreement to pay plaintiff \$13,831.68. For this sum, with interest from September 4, 1920, there should have been a judgment in favor of plaintiff. There was no competent evidence that the claims pleaded in the cross-petition were left open for future settlement. The cross-petition should have been dismissed. The judgment is therefore reversed and the cause remanded, with directions to enter judgment in favor of plaintiff for \$13,831.68, with interest

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from September 4, 1920, and to dismiss the cross-petition of defendants.

REVERSED.

JOY ROBERTS V. STATE OF NERRASKA

FILED SEPTEMBER 22, 1923. No. 23140.

1. **Criminal Law:** INSTRUCTIONS: BURDEN OF PROOF OF DEFENSE.
When on the trial of one charged with the violation of section 9829, Comp. St. 1922, the state has proved beyond a reasonable doubt that at the time and place charged in the information defendant carried a weapon concealed upon his person, and defendant relies upon the proviso contained in that section for his defense, it is not error for the court to instruct the jury that as to that issue the burden of proof is on the defendant, when by other instructions the jury are correctly informed as to the burden of proof on the general issue.
2. ———: INQUIRIES BEFORE SENTENCE. Errors cannot be predicted upon inquiries made by the trial court of one convicted of a violation of section 9829, Comp. St. 1922, before imposing sentence, nor is it error to set out in the record the substance of the inquiry.
3. ———: SENTENCE. Record examined, and *held* that the sentence imposed is not so excessive as to require a reduction by this court.

ERROR to the district court for Kearney county: WILLIAM A. DILWORTH, JUDGE. *Affirmed.*

King & Bracken, for plaintiff in error.

O. S. Spillman, Attorney General, and *C. L. Dort*, *contra.*

Heard before MORRISSEY, C. J., DEAN, ALDRICH and DAY, JJ., COLBY and REDICK, District Judges.

MORRISSEY, C. J.

Defendant was convicted of carrying concealed weapons and sentenced to serve a term of not less than one nor more than two years in the penitentiary.

It may be said that it is conceded that defendant at the time charged was carrying a revolver concealed upon his person. The defense relied upon is that proviso of the statute (Comp. St. 1922, sec. 9829) which reads as follows:

"If it shall be proved from the testimony on the trial,

or at a preliminary hearing of such case that the accused was, at the time of carrying any weapon or weapons as aforesaid, engaged in any lawful business, calling or employment and the circumstances in which such person was placed at the time aforesaid was such as to justify a prudent person in carrying the weapon or weapons aforesaid, for the defense of his person, property or family, the accused shall be acquitted or discharged."

Defendant requested the court to instruct the jury that, if they found that defendant was carrying the revolver "as a matter of precaution for his own safety, or if he had reason to believe that it would be prudent to take it from the automobile to avoid the likelihood of its being stolen," he would be justified in so doing.

Defendant further requested the court to instruct the jury: "That if you find from all the evidence that the defendant had good reason to believe and did believe that some person or persons had made threats of violence against his person, and that he had good reason to believe and did believe that such threats were likely to be, or might be, carried out at the time and place that the crime was committed as charged in the information, then you are instructed to find defendant not guilty."

These instructions were refused, and the court on its own motion by instruction No. 5 set out the proviso of the statute which defendant relied upon as a defense, and told the jury that, if the state had proved its case beyond a reasonable doubt, then the burden was on defendant to show that he came within the proviso. "If he does so, then you should find the defendant not guilty. The burden of so establishing this fact is upon him."

Error is assigned because of the court's refusal to give the requested instructions, and also, and perhaps with greater emphasis, is urged the giving of instruction No. 5, and especially its concluding sentence. The general rule is that the burden is on the state to establish the guilt of the accused, that is, to prove every fact and circumstance which is essential to the guilt of the accused,

or, as frequently stated, to prove every essential element of the crime charged, and to prove each item as though the whole issue rested on it, except in so far as a statute establishes a different rule. Stated in another way, the rule is that the law does not cast on accused the burden of satisfying the jury of his innocence. But it must be borne in mind that the statute on which this prosecution rests does not take into account the intent with which the act is done. It denounces the carrying of a concealed weapon. The undisputed evidence brought the defendant within the terms of the statute, but by the proviso relied upon defendant was free to purge himself of the guilt established by the state's evidence. In such a situation the general rule does not apply.

"While there has been some little confusion in the cases as to whether the burden of proof is ever on the defendant in a criminal prosecution, it is generally true that this is not the case. Indeed, it is stated as a maxim that the burden of proof never shifts from the prosecution to the defense. This, however, means only that it never shifts in so far as it is necessary to make out the specific crime charged in the indictment, by establishing the *corpus delicti* and the constituent elements of the crime. When distinct, substantive matter is relied upon by the defendant to exempt him from punishment and absolve him from liability, which is foreign to the issue as made by the state in the charge against him, the burden of proving it properly should be upon the defendant. As to such a fact he presents a subordinate issue upon which he goes forward with his evidence and the state rebuts. Thus where, in the trial of an indictment for robbery, it is proved beyond a reasonable doubt that the defendant was present at the time and place of the crime and participated in the acts which constitute the robbery, and the defendant for his defense interposes a plea of duress, the burden is not on the state to disprove such plea, but is on the defendant to main-

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tain his plea by a preponderance of the evidence." 8 R. C. L. 171, sec. 164.

By instruction No. 6 the court told the jury that, if they found that defendant was engaged in any lawful business, calling or employment, and that the circumstances in which he was placed at the time the weapon was found upon him were such as to justify a prudent person in carrying a weapon for the defense of his person, property or family, they should find the defendant not guilty. This instruction gave defendant the benefit of the proviso, and from a consideration of the entire charge it is clear that the jury were fully advised of defendant's rights under the statute. It is clear that the court was not guilty of prejudicial error either in refusing to give the instructions requested or in giving the instruction criticised.

We are urged to hold that the sentence imposed is excessive. And in connection with this assignment complaint is made because the record sets out the questions propounded by the court to defendant before imposing sentence, together with defendant's answers thereto. We fail to see how defendant can be prejudiced by a correct recital of what occurred in the court at the time sentence was pronounced. The statute (Comp. St. 1922, sec. 10173) made it the duty of the court to inquire into defendant's general conduct, and error cannot be predicated upon the inquiries made.

From a consideration of all the record, we find no prejudicial error, nor does the sentence imposed appear to be so severe as to require a reduction by this court, and the judgment is

AFFIRMED.

MISSOURI PACIFIC RAILROAD COMPANY, APPELLANT, v.
DRAINAGE DISTRICT, APPELLEE.

FILED SEPTEMBER 22, 1923. No. 22517.

1 **Drains:** ASSESSMENTS. Benefits accruing to a railroad by the

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drainage of a valley in which flood waters overflowed and injured the railroad tracks may be assessed by a drainage district organized under statutory authority. Comp. St. 1922, sec. 1758.

2. ———: ———. Evidence outlined in opinion held sufficient to sustain an assessment of benefits accruing to railroad property by drainage.

APPEAL from the district court for Richardson county:
JOHN B. RAPER, JUDGE. *Affirmed.*

J. A. C. Kennedy and Yale C. Holland, for appellant.
Kelligar, Ferneau & Gagnon, contra.

Heard before MORRISSEY, C. J., ROSE and ALDRICH, JJ.,
COLBY and REDICK, District Judges.

ROSE, J.

This is a controversy over the assessment of benefits accruing to railroad property by drainage. Comp. St. 1922, sec. 1758. Drainage District Number 5, Richardson county, is defendant. It was organized for drainage purposes under statutory authority. Comp. St. 1922, sec. 1744. By means of a channel and a number of laterals it constructed a drainage system in Muddy creek valley, Richardson county. Muddy creek was formerly the water-course in what is now the drainage district. The general direction of drainage is southeast. The new channel is about half the length of the old. The drainage district is approximately nine miles long and varies in width from one to three miles. The Missouri Pacific Railroad Company is plaintiff. Its railroad followed the general direction of Muddy creek more than three miles in the upper part of the valley and crossed that stream several times on bridges. The drainage board, upon the estimate and recommendation of its engineer, assessed the benefits accruing to the railroad property of plaintiff at \$41,386. From this assessment plaintiff appealed to the district court, where the amount was reduced to \$24,600. Plaintiff has again appealed.

The question presented by the appeal is the sufficiency

of the evidence to sustain the assessment for benefits. Plaintiff argues, and there is evidence tending to prove, that its rails, ties and ballast are on a roadbed four to six feet higher than the natural surface of the ground, that its tracks are now out of danger from flood waters, that its embankments are composed of gumbo, which is practically impervious to water, and that therefore the railroad property is not benefited by defendant's drainage system. The evidence shows conclusively that Muddy creek valley is subject to overflows. In 1883, 1907, 1912 and 1915 water covered plaintiff's roadbed in places and destroyed portions of its tracks, causing heavy losses. There is evidence of a dozen floods in Muddy creek valley in a single year. It is conceded by plaintiff that its property prior to 1915 was damaged by floods at intervals of four or five years, but in this connection it is argued that the railroad tracks were subsequently elevated above the plane of flood waters and are now beyond the danger of injury therefrom. This theory of the controversy was supported by engineers who testified on behalf of plaintiff, and was ably advocated at the bar. The testimony of other engineers called by defendant as witnesses is, however, of a different import. There is evidence tending to prove that the drainage system of defendant will lower the plane of floods along the roadbed and carry the waters therefrom more rapidly. The effect of this, according to one engineer, is to protect the embankment, retard deterioration in ties and rails, preserve ballast, and decrease the number of necessary railroad bridges. Another engineer advanced the theory that drainage will make further elevation of the tracks unnecessary, there being evidence tending to show that the carrying capacity of the drainage channel will increase with floods, while the nature of the watershed and the windings of Muddy creek in its natural state would inevitably raise the surface of the valley and necessitate further elevation of railroad tracks. The estimate of

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benefits under either theory of defendant's engineers exceeds the assessment from which the appeal is taken. The trial judge, in the light of all the evidence, viewed the railroad property as affected by the drainage system, and there does not seem to be a sufficient reason to disturb his finding. The judgment seems to be supported by the evidence.

AFFIRMED.

DOUGLAS MOTORS CORPORATION, APPELLANT, v. DANIEL BAUM, JR., ET AL., APPELLEES.

FILED SEPTEMBER 22, 1923. No. 22358.

Corporations: ACCOUNTING. Evidence examined, and *held* sufficient to sustain the findings and judgment of the trial court.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Brome & Ramsey, J. P. Uvick and H. C. Brome, for appellant.

Gaines, Van Orsdel & Gaines, contra.

Heard before MORRISSEY, C. J., ROSE, DEAN and DAY, JJ., BLACKLEDGE and COLBY, District Judges.

DAY, J.

This is an action in the nature of an accounting brought by the Douglas Motors Corporation against Daniel Baum, Jr., and the City Safety Deposit Company, to recover the value of 500 shares of stock in the plaintiff corporation. The action is based upon the theory that the shares of stock were issued to the City Safety Deposit Company without any consideration being paid therefor, and that the latter defendant had sold and transferred to innocent purchasers the said shares of stock so that the same could not be canceled. The plaintiff seeks to hold the defendant Baum liable upon the theory that, as president of the plaintiff corporation, and as a

member of the board of directors, he participated in the wrongful issuance of the shares of stock to the City Safety Deposit Company. The defendants denied that there was any fraud in the issuance of the shares of stock, and alleged that the plaintiff received a valid and legal consideration therefor. The trial resulted in a judgment in favor of the defendants. Plaintiff appeals.

The record shows that a corporation known as the Drummond Motor Company was organized in 1910 for the purpose of manufacturing and selling motor vehicles. The stock in this corporation was held largely by Frank W. Bacon and Walter J. Griffith. Bacon, who was a mechanical engineer of considerable genius and experience, had designed a type of motor car, known as the "Drummond," which the company proposed to manufacture and place on the market. The Drummond Motor Company did not have the necessary means to purchase materials in large quantities for the manufacture of this car, and accordingly applied to Daniel Baum, Jr., and Dan W. Gaines for a loan with which to purchase materials. After considerable negotiations, an agreement was entered into whereby Dan W. Gaines, Albert L. Schartz, David Baum, and Daniel Baum, Jr., under the name of the Drummond Sales Company, agreed to advance \$15,000 to the Drummond Motor Company to purchase materials for use in the manufacture of the Drummond cars. The Drummond Sales Company advanced the \$15,000, and later increased the amount, so that in December, 1916, the advancements amounted to \$44,000. To secure these advances thus made, a bill of sale was executed by the Drummond Motor Company on the materials purchased. The Drummond Motor Company also entered into a contract with the Drummond Sales Company to construct out of the materials purchased 100 cars and to sell the same to the Drummond Sales Company for \$700 a piece. In December, 1916, a scheme was suggested by one of the interested parties

which contemplated the organization of a new corporation with a large capital, which would succeed to the business of the Drummond Motor Company, and assume its indebtedness. Accordingly Daniel Baum, Jr., Frank W. Bacon, and Richard O. Bunn, residents of Nebraska, and George F. Sayre of South Dakota, organized a corporation under the laws of South Dakota, known as the Douglas Motors Corporation, with an authorized capital of \$1,000,000, divided into shares of \$100 each. Sayre was employed to participate in the organization for the purpose of complying with the laws of South Dakota. By the terms of the articles of incorporation the four incorporators constituted the board of directors until such time as a board of directors should be elected by the stockholders at their annual meeting. Following the organization a meeting was held of the board of directors, excepting Sayre, and the following officers were elected: Daniel Baum, Jr., president, Frank W. Bacon, vice-president and general manager, and Richard O. Bunn, secretary and treasurer.

At the first meeting of the board of directors it authorized the purchase from the Drummond Motor Company of the automobiles in course of manufacture, all of the materials on hand, its leasehold, and good-will, including the right to manufacture and sell the Drummond car. Arrangements were made by which stock in the new company was issued to the Drummond Motor Company of the face value of \$80,000 in payment therefor. The new company also guaranteed the payment of the indebtedness of the Drummond Motor Company amounting to approximately \$55,000. While the record is not entirely clear as to the manner in which the City Safety Deposit Company acquired the bill of sale which had been executed to the Drummond Sales Company, and also the contract for the sale of 100 cars, it is assumed that it did so. An arrangement was made between the Douglas Motors Corporation and the City Safety Deposit

Company, by which the deposit company released the Douglas Motors Corporation from the obligation of the contract upon which 74 cars had not been delivered, and also released the bill of sale on the materials, resigned as transfer agent, and other considerations not made clear, taking in payment therefor 500 shares of stock in the new corporation, which shares of stock form the basis of the present controversy. The testimony shows that the contract for the sale of cars which the City Safety Deposit Company surrendered was a valuable one, there being a profit of \$300 a car on the number of cars actually delivered. The other rights surrendered had a substantial value. Considering the fact that the value of the shares of stock in the Douglas Motors Corporation at the time the arrangement was made was more or less speculative, depending upon the success of the enterprise, it occurs to us that the value of this stock was not so disproportionate to the consideration surrendered by the City Safety Deposit Company as to be subject to criticism. Considering the whole record, we are convinced that the transaction between the plaintiff and the City Safety Deposit Company was entered into in good faith by the parties, and that the plaintiff has not shown facts sufficient to warrant the court in setting the transaction aside upon the ground of inadequacy of consideration in the issuance of the stock. If, as we hold, the City Safety Deposit Company is not liable, it follows as a matter of course that no liability could attach to Baum upon the theory that he wrongfully participated in the issuance of the stock.

The judgment of the lower court is right, and it is, therefore,

AFFIRMED.

Douglas Motors Corporation v. Baum.

DOUGLAS MOTORS CORPORATION, APPELLEE AND CROSS-
APPELLANT, V. DANIEL BAUM, JR., APPELLANT
AND CROSS-APPELLEE.

FILED SEPTEMBER 22, 1923. No. 22396.

Compromise and Settlement. Upon the state of facts set forth in the opinion, it is *held* that all matters in dispute between the parties were fully settled by the agreement of compromise, which was supported by a sufficient consideration and fully performed.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed in part, and reversed in part.*

Gaines, Van Orsdel & Gaines, for appellant.

Brome & Ramsey and H. C. Brome, contra.

Heard before MORRISSEY, C. J., ROSE, DEAN and DAY,
JJ., BLACKLEDGE and COLBY, District Judges.

DAY, J.

This is an action in the nature of an accounting brought by the Douglas Motors Corporation against Daniel Baum, Jr. In the first cause of action the plaintiff seeks to recover from Baum the value of 675 shares of its capital stock, which it alleges was fraudulently issued to Frank W. Bacon without any consideration paid to the plaintiff therefor. Bacon was not served with process, and has since died. The plaintiff seeks to hold Baum liable upon the theory that, as president of plaintiff corporation, and as a member of its board of directors, he participated in the wrongful issuance of the shares of stock. In the second cause of action the plaintiff seeks to recover from Baum the value of 76 shares of its capital stock, which it alleges was fraudulently issued to him without any consideration being paid therefor.

The answer of Baum denied that the stock issued to Bacon or to himself was issued without any consideration, alleged that there was a valid legal consideration therefor, and denied that there was any fraud in the

issuance of the shares of stock; that all the then stockholders consented to the issuance of the said shares to Bacon as well as to himself. Baum also pleaded that there had been a full and complete settlement of the matters which form the basis of plaintiff's cause of action.

The trial court found against the plaintiff on the first cause of action, and dismissed it. Upon the second cause of action the court found in favor of the plaintiff; found the value of the 76 shares of stock to be \$7,500, and rendered judgment against Baum for that sum, with interest. Baum has appealed from the judgment against him on the second cause of action. Plaintiff has filed a cross-appeal from the judgment on the first cause of action.

The facts giving rise to the controversy are as follows:

In 1910 a corporation was organized in Nebraska, known as the Drummond Motor Company, for the purpose of manufacturing and selling motor vehicles. The stock in this corporation was held largely by Frank W. Bacon and Walter J. Griffith. Bacon, who was a mechanical engineer of considerable genius and experience, had designed a type of motor car known as the "Drummond," which the company proposed to manufacture and place on the market. The Drummond company did not have sufficient means to manufacture this car on the large scale desired, and accordingly applied to Daniel Baum, Jr., and others for a loan. After some negotiations a loan was made which eventually amounted to approximately \$44,000. In this way Baum, who was a successful business man, became familiar with the affairs of the Drummond company. In December, 1916, a scheme was suggested by either Baum or Bacon that a new corporation be organized with a large capital which would take over the business and assets of the Drummond company and assume its liabilities. Accordingly Daniel Baum, Jr., Frank W. Bacon, and Richard O. Bunn, residents of Nebraska, and George F. Sayre

of South Dakota, organized a corporation under the laws of South Dakota with an authorized capital of \$1,000,000, divided into shares of \$100 each. The purpose of the corporation was to engage in the manufacture and sale of motor vehicles. By the terms of the articles of incorporation the four incorporators constituted the board of directors until a board of directors was elected by the stockholders at their annual meeting.

Following the organization a meeting of the board, excepting Sayre, was held, and elected Daniel Baum, Jr., president, Frank W. Bacon, vice-president and general manager, and Richard O. Bunn, secretary and treasurer. At the first meeting of the board of directors, in pursuance to a prearranged plan, 675 shares of the capital stock was issued to Baum, and a like number of shares to Bacon. Other shares were issued to other parties. Shares were also issued to the Drummond Motor Company for its lease, good-will and materials, and the business of the Drummond company was taken over by the plaintiff corporation. Up to this time no money had been paid to the corporation for the shares of stock issued.

A stock-selling scheme was then inaugurated to sell the stock to the public, and over \$500,000 of stock was thus sold. More than a year after the corporation had been operating, dissension arose among the directors, and the question was raised by some of the directors as to Baum's right to the stock which had been issued to him. At that time Baum still owned 599 shares of the 675 shares which had been originally issued to him, the remaining 76 shares he had sold. Following the discussion, which appears to have been conducted with considerable asperity, Baum submitted to the board a proposition in writing, as follows:

"Inasmuch as there have been complaints because of my holding stock in the Douglas Motors Corporation, and the manner of acquiring the same, in order to avoid

all controversy and for the purpose of full compromise and settlement, I make the following proposition: I am willing to assign to the Douglas Motors Corporation, for cancelation, any and all stock owned by me or in my name, namely 599 shares, on condition that the acceptance thereof shall be in full settlement of any and all matters between said corporation and myself, of every kind and character, growing out of the issuance of stock in said corporation and my connection with the corporation as an officer and director, and otherwise."

This offer was accepted by the full board of directors, each member voting to accept the proposition. Thereupon Baum surrendered the 599 shares of stock and resigned as president of the corporation, for which service he was being paid \$250 a month, and thus severed his relationship to the corporation.

Two questions are argued in the briefs: First, that the corporation has no standing to now question the issuance of the shares of stock to Baum or Bacon, because at the time the shares were issued every one interested in the corporation assented thereto; second, that Baum has fully and completely settled for any liability which might have been legally charged against him. Upon the first proposition suggested, the authorities appear to be divided. In *Old Dominion Copper Mining & Smelting Co. v. Lewisohn*, 210 U. S. 206, it is held that a corporation cannot assail the issuance of its stock, when at the time of its issuance all the stockholders consented thereto. Under the same facts an opposite conclusion was reached by the supreme court of Massachusetts in *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 203 Mass. 159. We do not deem it necessary at this time to commit ourselves as to which line of authorities we prefer to follow, as the settlement appears to us to be decisive of the question of Baum's liability. The language of the proposal by Baum, which was

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accepted by the corporation acting through its board of directors, is comprehensive in its scope, and includes all matters between the corporation and Baum of every kind and character growing out of the issuance of stock in the corporation, and of his connection with the corporation as an officer, director, or otherwise.

The terms of the settlement were clearly broad enough to include, not only the shares of stock issued to Baum, but also those issued to Bacon, if it could be said that Baum was liable for having participated in the issuance of the shares to Bacon. The plaintiff seeks to avoid the settlement upon the ground that there was no consideration to support it, and the argument is advanced that Baum simply surrendered a part of the stock to the whole of which he had no legal claim. While it is ordinarily true that a dispute as to the legal effect arising from undisputed facts is not sufficient to sustain a settlement, yet in this case we think there was more than the legal question involved in the transaction. Baum surrendered a valuable right, viz., that of being president of the corporation, as well as the salary which went with the office. Considering the entire record, we are quite satisfied that the settlement entered into precludes the plaintiff from recovering from Baum.

From what has been said it follows that the judgment dismissing the first cause of action was right, and should be affirmed. The judgment against Baum on the second cause of action should be reversed, and the action dismissed.

AFFIRMED IN PART, AND REVERSED IN PART.

FRED L. MILLER ET AL., APPELLEES, V. AMERICAN
COOPERATIVE ASSOCIATION, APPELLANT.

FILED SEPTEMBER 22, 1923. No. 22477.

Receivers: ATTACHMENT. The appointment of a receiver of a foreign corporation by a court of the state of its domicile does not thereby bring the property of the corporation situated in this state *in custodia legis* until the receiver has reduced the property in this state to actual

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possession, and does not defeat or destroy the lien of attaching creditors acquired after the appointment of such receiver.

APPEAL from the district court for Dawes county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

E. D. Crites and F. A. Crites, for appellant.

J. E. Porter, contra.

Heard before MORRISSEY, C. J., DEAN, ALDRICH and DAY, JJ., COLBY and REDICK, District Judges.

DAY, J.

On February 9, 1921, the plaintiffs commenced this action against the American Cooperative Association to recover judgment for a sum of money which the plaintiffs had theretofore been required to pay as indorsers upon a promissory note executed by the defendant. The action was aided by an attachment upon defendant's property, issued upon the ground that the defendant was a foreign corporation. On March 30, 1921, defendant's motion to dissolve the attachment was overruled. The trial upon the general issues resulted in a judgment in favor of the plaintiffs for \$1,616.42, and an order was made directing the sale of the attached property to satisfy the judgment. Defendant appeals.

The principal error relied upon by the defendant is the overruling of its motion to dissolve the attachment.

The defendant is a Wisconsin corporation, transacting business, as indicated by its name, upon the cooperative plan. The defendant's central supply house was located in Wisconsin. It also maintained branch mercantile establishments in other communities where there was sufficient membership to justify so doing. One of these branch establishments was located at Crawford, Nebraska, and was under the local management of the plaintiffs.

In the conduct of the local business at Chadron, the association borrowed a sum of money from a local bank,

giving its note therefor. The note was indorsed by the plaintiffs, and later paid by them.

Prior to the issuance of the attachment, a receiver had been duly appointed by a court of competent jurisdiction in the state of Wisconsin, the domicile of the defendant, with the usual powers and duties of receivers, the order reciting that the stock, property and effects of the defendant "are hereby sequestered, * * * wheresoever situated." The defendant being a foreign corporation, there is no doubt that the statutory grounds for the issuance of an attachment existed.

But it is urged by the defendant that its property was not the subject of seizure by attachment, because at the time of the levy the property was *in custodia legis*. It appears, however, that prior to the attachment no steps had been taken by the receiver to acquire possession of defendant's property situated in this state. The precise question is then presented, whether the property of the defendant in this state was *in custodia legis* so as to exempt it from the process of attachment issued by the courts of this state upon the application of a local creditor of the defendant.

It is familiar law that the powers which are exercised by the courts are limited, and cannot ordinarily be exercised beyond the territorial jurisdiction of the court issuing the order. This restriction upon judicial authority has given rise to the consideration by the courts in numerous cases involving the rights of receivers appointed in a foreign state over the property of the insolvent debtor situated in other states. The weight of authority upon the precise question before us seems to support the view that the appointment of a receiver of a foreign corporation by a court of the state of its domicile does not thereby bring the property of the corporation situated in another state *in custodia legis* until the receiver has reduced such property to actual possession, and does not defeat or destroy the lien of attaching creditors

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in the other state acquired after the appointment of such receiver. This rule is founded upon the well-settled principle that a receiver possesses no power or authority beyond the jurisdiction of the court appointing him. There has been some relaxation of this rule by modern decisions, so as to permit a receiver on the principle of comity to exercise in another state the functions vested in him by his appointment but, this is permitted only where it will not violate public policy or infringe upon or defeat the rights of domestic creditors. A few of the many authorities supporting this view are: *Frowert v. Blank*, 205 Pa. St. 299; *Catlin v. Wilcox Silver Plate Co.*, 123 Ind. 477; *Lichtenstein Bros. & Co. v. Gillett Bros.*, 37 La. Ann. 522. Defendant cites *Veith v. Ress*, 60 Neb. 52. In that case, however, the receiver was in possession of the property. *Ogden v. Warren*, 36 Neb. 715, is also cited, but we do not consider it an authority sustaining the point at issue.

The plaintiffs also urge that, the defendant being in the hands of a receiver, the latter has no standing in court to urge the dissolution of the attachment. In the view we have taken of the case, however, it seems unnecessary to discuss this question.

From what has been said, it follows that the judgment of the trial court is right, and it is, therefore,

AFFIRMED.

CLARENCE E. GOVIER, APPELLANT, V. JOSEPH F.
WILSON ET AL., APPELLEES.

FILED SEPTEMBER 22, 1923. No. 22489.

1. **Evidence** examined, and *held* sufficient to sustain the decree of the trial court in so far as it dismisses the plaintiff's cause of action.
2. **Evidence** examined, and *held* not sufficient on the accounting between plaintiff and defendants, W. and K., to sustain the judgment of the trial court.

APPEAL from the district court for Custer county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed in part, and reversed in part.*

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Sullivan, Squires & Johnson, for appellant.

Prince & Prince and Kelly & Schnell, contra.

Heard before MORRISSEY, C. J., DEAN, ALDRICH and DAY, JJ., COLBY and REDICK, District Judges.

DAY, J.

The plaintiff, Clarence E. Govier, who was purchaser at a partition sale of a certain tract of land, and who had paid to the referee the amount of his bid, intervened in the partition action and sought to have a credit established upon his bid by reason of the facts alleged, and prayed that the referee be ordered by the court to refund to him the amount of the credit found to be due. The trial court directed the plaintiff to separately docket his action, and ordered the referee to retain \$1,054 out of the money paid upon the bid until the further order of the court, and further ordered the referee to distribute the balance of the purchase price to the parties entitled thereto. As originally filed, the petition named Joseph F. Wilson and P. Jerry Kelly defendants. Later Rose E. Richardson was made an additional party defendant. Upon the trial the court found upon the issue presented by the petition in favor of the defendants, and dismissed the plaintiff's action. The court also found, upon an accounting between the plaintiff and the defendants Wilson and Kelly, in favor of the defendants, and rendered a personal judgment in their favor against plaintiff for \$40.40. Plaintiff appeals.

The facts are somewhat peculiar. The property partitioned consisted of a section of land in Custer county, Nebraska, owned by the defendant Rose E. Richardson, formerly Rose Empfield, and her two minor children, Paul McKee Empfield and Lillie Ruth Empfield, each being the owner of an undivided one-third interest. Mrs. Richardson was desirous of disposing of the property, but, inasmuch as the two minors owned part of it, she could not do so without resort to a par-

tition action. The land was leased to S. S. Sallee for a term of years expiring March 1, 1922. On June 23, 1919, C. E. Bass, a brother of Mrs. Richardson, and who handled her business affairs in Custer county, entered into a written contract with P. Jerry Kelly and Joseph F. Wilson, the defendants herein, to sell the property in question to them for \$16,000, subject to the Sallee lease. The contract recited that the land was owned by Mrs. Richardson and her two minor children above named, and that a partition suit was necessary to be had to acquire a good title. Kelly and Wilson paid \$700 on account of the purchase price, the balance to be paid according to the terms of the contract when a title to the land could be given. The partition action was commenced by Mrs. Richardson on February 17, 1919; the two minor children, and Rose Richardson as their guardian, being named defendants. N. T. Gadd was appointed guardian *ad litem* for the two minor children. On February 5, 1919, Wilson, acting for himself and Kelly, bought Sallee's rights under the lease, paying therefor \$1,200; Sallee agreeing to vacate the premises on or before March 1, 1919. On March 5, 1919, Wilson and Kelly, anticipating that their contract for the purchase of the land would be carried out, entered into a contract to sell the land in question to the plaintiff, Govier, for \$22,400. At the time of entering into the contract the plaintiff paid \$1,500 in cash to Wilson and Kelly, the balance of the purchase price to be paid as provided in the contract. The contract contained other provisions which will be hereinafter considered.

On May 3, 1919, a judgment in partition was duly entered. Edwin F. Myers was appointed referee, and, upon his report being made, an order was entered directing the sale of the property. On June 23 the referee reported a sale of the property to P. Jerry Kelly for \$16,000. This sale was objected to by the guardian *ad litem*, and the court set the sale aside. Later, on Sep-

tember 8, 1919, the referee sold the property to plaintiff, Govier, for \$23,354. This sale was confirmed, and deed ordered to Govier, the purchaser, who paid the purchase price to the referee. At this time Govier was in possession of the premises and had crops ready for harvest under his contract with Kelly and Wilson.

The plaintiff's theory is founded upon the idea that he was obliged to bid \$23,354 for the property at the sale in order to protect his crops which were then growing upon the land; that he is entitled to recover from Wilson and Kelly the difference between the amount of his contract with them, to wit, \$22,400, and the amount of his bid; that the contract between Bass and Wilson and Kelly would be carried out to the extent at least of the interest of Mrs. Richardson, and that Wilson and Kelly would be entitled to receive a part of the proceeds of the referee's sale.

The main question upon this phase of the case, as we view it, turns upon the construction to be given to the contract between the plaintiff and Wilson and Kelly. If under the terms of that contract Wilson and Kelly were not bound to sell the property to the plaintiff, then the plaintiff's cause of action must fail. This contract contained provisions, as follows:

"It is further understood and agreed by and between the parties to this contract that the said parties of the first part (Wilson and Kelly) have purchased the real estate above described from C. E. Bass as agent for Mrs. Richardson and her minor children upon a contract signed by the said C. E. Bass as such agent, and it is further understood and agreed by and between the parties hereto that, in order for the parties of the first part to secure title to the real estate above described, said land will have to be sold by a referee appointed by the district judge of Custer county, Nebraska, and that said sale will be at public auction, and if for any reason the parties of the first part are unable to secure title

to said real estate, under the terms of their contract with the said C. E. Bass, then, and in that event, one thousand dollars (\$1,000) of the fifteen hundred dollars (\$1,500) paid by the parties of the second part (Govier and his wife) shall be retained by the said parties of the first part as rent for the real estate described from the fifteenth (15th) day of March, 1919, to the first (1st) day of March, 1920, and the parties of the first part agree to refund to the said parties of the second part the sum of \$500 with interest thereon at the rate of 6 per cent. per annum. It is understood by and between the parties hereto that the said parties of the first part do not at this time have title to said real estate and their ownership thereof depends upon the contract heretofore mentioned between them and the said C. E. Bass, and in the event that they are for any reason unable to secure their title as provided for in said contract, then they are bound only under the leased provision heretofore mentioned in this contract. * * * It is further agreed by and between the parties hereto that, in the event the said parties of the first part do not secure a deed from the referee for any reason, then in that event they agree to lease the premises above described to the said parties of the second part for two years from March 1, 1920, to March 1, 1922, for the sum of one thousand (\$1,000) per year."

It will be observed that the contract recites, in substance, that Wilson and Kelly have purchased the property from C. E. Bass as agent of Mrs. Richardson and her minor children; that in order to secure a title the land must be sold at a referee's sale under the direction of the court at public auction; that, if for any reason Wilson and Kelly are unable to secure title to the land under the terms of their contract with Bass, then \$1,000 of the \$1,500 paid by the plaintiff is to be retained by Wilson and Kelly as rent for the land from March 15, 1919, to March 1, 1920, the balance of \$500 with 6 per cent. interest to be returned by Wilson and Kelly to

the plaintiff. The contract further recites that, if for any reason Wilson and Kelly are unable to secure title as provided in the Bass contract, they shall be bound only under the leased provision of the contract herein-after mentioned, which is that Wilson and Kelly agree to lease the premises to the plaintiff for two years from March 1, 1920, to March 1, 1922, for \$1,000 a year. There is no ambiguity in the terms of this contract. Its language is precise, and its terms are easily understood. In construing a contract it is the duty of the court to give force and effect to its several provisions. Plaintiff was bound to take notice of the terms of the contract, and, had he done so, he would have been apprized that Wilson and Kelly were purchasing the property for \$16,000, subject to the Sallee lease. Wilson and Kelly at the first sale bid \$16,000 for the property, but this sale was set aside. It seems clear that Wilson and Kelly, in order to put themselves in a position to carry out their contract with the plaintiff, were not bound to bid for said property above \$16,000. The plaintiff contends that he was obliged to bid \$23,354 in order to protect his crops, but this position is hardly sound, because the referee's sale was subject to the rights of the Sallee lease. Construing the contract as a whole in the light of subsequent events, which seem to have been contemplated and provided for in the contract, it seems quite clear to us that the only liability on the part of Wilson and Kelly under the contract is to fulfil their agreement for the leasing of the premises.

The plaintiff also objects to that part of the decree wherein the court rendered judgment in favor of Wilson and Kelly and against the plaintiff for \$40.40. The objection is made that there is no issue properly raised, and no proof to sustain a judgment of this amount. It is true that there is not a cross-petition filed with the answer of Wilson and Kelly setting out the facts showing an indebtedness from the plaintiff to them. Their answer in great detail sets up all of the facts, and

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refers to the several contracts, and prays for an accounting between the plaintiff and themselves. The evidence upon the status of the accounts is not very satisfactory. It does appear, however, that Wilson and Kelly have \$1,500 of the plaintiff's money, and that the plaintiff has been in possession of the land since about March, 1919. Under the terms of the contract he was to pay \$1,000 for the land from March 15, 1919, to March 1, 1920, and \$1,000 from March 1, 1920, to March 1, 1921, and \$1,000 from March 1, 1921, to March 1, 1922. The decree of court was entered on June 6, 1921, and recited that the rent for the year 1919-1920 had been paid, and that for the year 1920-1921 there was due \$40.40. We are unable to reconcile the findings upon this branch of the case with the facts as disclosed by the record. In the interest of justice to all parties, it seems that the cause should be remanded upon the matter only of the accounting of the rents between plaintiff and Wilson and Kelly. The judgment of the lower court is affirmed in part and reversed in part, and the cause remanded for further proceedings in conformity with this opinion; each party to pay his own costs in this court.

AFFIRMED IN PART, AND REVERSED IN PART.

BARTLETT STATE BANK, APPELLEE, v. DANIEL L.
JOHNSTON ET AL., APPELLANTS.

FILED SEPTEMBER 22, 1923. No. 22482.

1. **Appeal:** REVIEW. This court will not determine an issue of fact presented to the trial court unless the evidence is preserved in a bill of exceptions.
2. ———: ———. Affidavits, used as evidence in support of objections to confirmation of a judicial sale, will not be considered in this court unless incorporated in a bill of exceptions.

APPEAL from the district court for Wheeler county:
EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

J. M. Shreve and P. N. Johnston, for appellants.

A. L. Bishop, contra.

Heard before MORRISSEY, C. J., ROSE and GOOD, JJ.,
BLACKLEDGE, COLBY and REDICK, District Judges.

GOOD, J.

This is an appeal from an order confirming a judicial sale of real estate, made pursuant to an order of sale issued after decree in an action to foreclose a real estate mortgage. The only objection made is that the land was sold for less than its fair and reasonable value. This presents only a question of fact. The evidence has not been preserved in a bill of exceptions, so that this court is not advised as to evidence which was presented to the trial court. We must therefore presume that the finding and order was based on sufficient evidence.

Appellant in his brief directs our attention to two affidavits, appearing in the transcript, which purport to give the views of affiants as to the value of the land in question. This court has repeatedly held that affidavits, used as evidence on any issue of fact tried in the district court, cannot be considered in this court unless they are incorporated in a bill of exceptions. The reason for such holding is that, in the absence of a bill of exceptions properly authenticated, the court is not advised whether such affidavits were presented or considered by the trial court, nor does it know what other evidence may have been presented on the question. Among the many decisions of this court sustaining this view are: *Morris v. Hines*, 107 Neb. 788; *Amos v. Eichenberger*, 107 Neb. 416; *Carmichael v. McKay*, 81 Neb. 725; *Duffy v. Scheerger*, 91 Neb. 511; *Schmidt v. Village of Papillion*, 92 Neb. 511; *Taylor v. American Radiator Co.*, 93 Neb. 24; *Burrowes v. Chicago, B. & Q. R. Co.*, 85 Neb. 497; *Crocker v. Steidl*, 82 Neb. 850; *Mercer v. Armstrong*, 98 Neb. 645; *Koepke v. Delfs*, 95 Neb. 619.

The judgment of the district court is

AFFIRMED.

Heyer v. Heyer

AUGUST JOHN HEYER ET AL., APPELLEES, V. PAULINE
HEYER, APPELLANT.

FILED SEPTEMBER 22, 1923. No. 22366.

1. **Wills: CONSTRUCTION.** "In the construction of a will the intention of the testator, if it can be ascertained, must govern. Such intention should be ascertained from a liberal interpretation and comprehensive view of all the provisions of the will." *Worley v. Wimberly*, 99 Neb. 20.
2. ———: **DEVISE: CONSTRUCTION.** Under the provisions of the testator's will set out in the opinion, *held*, that he intended to convey to his widow only a life estate, coupled with a power of sale under a certain contingency. *Held*, further, that the contingency contemplated did not arise and such power of sale became, and is, extinguished.

APPEAL from the district court for Otoe county:
JAMES T. BEGLEY, JUDGE. *Affirmed.*

W. F. Moran, for appellant.

Pitzer, Cline & Tyler, contra.

Heard before LETTON, ROSE, DAY, DEAN, ALDRICH and
GOOD, JJ., BLACKLEDGE, District Judge.

BLACKLEDGE, District Judge.

This action was instituted in December, 1920, to obtain a construction of the will of Edward Heyer, which had been admitted to probate in the year 1890, in its effect upon the title to certain real estate situated in Otoe county, Nebraska, of which the testator died seised and possessed.

The will was perhaps autographic, or, in any event, was written by one wholly unacquainted with the preparation or requirements of such instruments. It was, however, the effort of an untrained layman to express the wishes of the testator in the serious business of disposal after his death of the property of which he was possessed, and it is the duty of the court, acting under established rules, to give effect as far as possible to such wishes and to authoritatively declare the intent of the testator.

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The will, so far as concerns the present inquiry, is written as follows:

"After my death the farm shall go to my wife, Pauline Heyer.

"After her death the farm shall go to my son, August John Heyer. * * *

"In case my wife cannot keep up the place (farm), I give her the right to sell it, provided she is single.

"Should she marry again she shall not sell it."

The testimony covers a much broader field than the issues made by the pleadings. The petition prays for a construction of the will in respect to the rights of the son derived therefrom, and of the widow, and of her power of sale, and asks that it be held to establish a life estate in Pauline Heyer with remainder to the son; and, if it should be held that the widow has a right of sale, that the remainder will be protected by a trusteeship for the investment and conservation of the proceeds. The defendant in her answer prays that she be decreed to own the fee simple title to the premises, and that she may dispose of the same and convey absolute title. It will be seen that the sole question actually involved in the case is a determination of the title or interest devised by the will to the widow and to the son, including the effect properly to be given to the clause respecting the sale of the premises by the widow.

The daughters, of whom there are five, are not parties to this action and have not applied to be made parties. Any question as to the propriety or fairness of the terms of the will as affecting them cannot be considered in this case, in the disposition of which it must be remembered that it is not the function of the court to substitute the opinion of a judge or judges for that of the testator as to what would constitute the right disposition of his estate, but its sole function is and should be to ascertain and declare with as much certainty as possible what was the real intention of the testator. The will is an established fact and muniment of title. It

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has stood admitted to probate and unchallenged in the courts for 30 years. The widow made her election to take under it. The county court in making its order of final distribution July 14, 1891, found that by the terms of the will the widow, defendant herein, took a life estate in the farm with the right to sell it unless she remarried, provided she could not pay the incumbrance.

We can determine the meaning and effect of the will upon the interests of the parties to this suit in the land involved, but we cannot in this case undertake to consider any adjustments they may have made or attempted with others, nor do we find the pleadings or evidence such that we can undertake to ascertain or adjudicate any right of contribution or reimbursement as between the life tenant and remainderman.

Considering now the will, it is held to be elementary that in its construction the court should effectuate the intention of the testator if it can be ascertained, and in order to ascertain the same should place itself as nearly as possible in the position of the testator and consider the whole of the instrument as distinguished from some particular part or clause thereof. When there are different provisions in the will as to the disposition of specified property, they must be construed together to ascertain the intention of the testator. *In re Estate of Willits*, 88 Neb. 805; *Worley v. Wimberly*, 99 Neb. 20; *Grant v. Hover*, 103 Neb. 730.

The language of the will is simple. The rules of construction to be applied are elementary. The first two sentences hereinbefore quoted are not subject to construction, when both are considered, they so clearly give a life estate to the wife and remainder to the son.

It is the clause pertaining to sale that is material here. As to this we must seek to put ourselves in the position of the testator. It contains in itself a limitation, in that the wife was prohibited thereby from selling if she should marry again. A sale was authorized only

in the event she could not keep up the farm. When we consider the situation in which the testator was then placed, in the year of the drought which many of us remember, himself about to be taken from his wife and family of five minor children, living upon the land, which was incumbered by mortgage for the entire purchase price, there is no doubt that the thing in his mind was her ability or inability to so manage as to take the farm out from under the burden then existing and accumulating burden of taxation. This, with the aid of her children, principally her son, she did accomplish, and ten years later the mortgage indebtedness was extinguished. The farm had been improved and was carried on in a successful manner for more than ten years additional. We do not think the testator reasonably could have contemplated that, long after the expiration of this time, and when his wife in the ordinary course of nature had become aged and unable to personally supervise the farming operations, the power of sale should become operative. It was intended to cover the contingency of her being able to keep up the farm as a family home under the conditions as they then existed; and when such conditions were overcome and the property released from incumbrance and placed upon a revenue producing basis which has furnished her means to the extent shown by the record that she has, from so much of the proceeds as she has received, accumulated a surplus of more than \$7,000, it is clear that the purpose for which that clause was inserted has been accomplished and it is no longer in force.

We, therefore, hold that the conclusion of the district court to the effect that the plaintiffs are owners of the remainder in the land, subject only to the life estate therein of the defendant, Pauline Heyer, and that such ownership is free and clear of all present right of the defendant, Pauline Heyer, to sell or convey the land in fee simple, is right, and it is

· AFFIRMED.

Goldenstein v. Goldenstein.

GRACE GOLDENSTEIN, APPELLANT, v. FRANK GOLDENSTEIN,
APPELLEE.

FILED SEPTEMBER 22, 1923. No. 22502.

1. **Divorce:** JURISDICTION. Under the provisions of section 3, ch. 45, Laws 1909 (Comp. St. 1922, sec. 1555), the authority of the district court over its decrees in divorce actions was extended, as if in term time, to the period of six months after trial and decision.
2. ———: DECREE: POWER TO VACATE. An order of the trial court in reference to the vacation of a decree awarding a plaintiff wife a sum in gross as permanent alimony, which order is made after the expiration of the six months' period, must rest upon the grounds of like orders made in cases after term time.
3. ———: INTERLOCUTORY DECREE. An order of the district court in a divorce action vacating a former decree as to permanent alimony, and which expressly reserves for the future consideration and judgment of the court the amount of alimony to be granted and all allowances for the support of plaintiff and the children, and also the determination of defendant's application to set aside the decree of divorce is, for the purposes of appeal, interlocutory, and not final.

APPEAL from the district court for Gage county:
LEONARD W. COLBY, JUDGE. *Judgment modified.*

Sabin & Vasey, for appellant.

Safranek, Dutton & Massey, contra.

Heard before MORRISSEY, C. J., LETTON and GOOD, JJ..
BLACKLEDGE and REDICK, District Judges.

BLACKLEDGE, District Judge.

The controversy submitted on this appeal arises upon the rendition and subsequent modification of a decree in the district court for Gage county awarding the plaintiff divorce and alimony.

The case was originally tried and decree entered December 1, 1920. By this decree the plaintiff was awarded an absolute divorce, custody of the two minor children of the parties, provision for an unborn child, and was given permanent alimony in the sum of \$8,000, made payable in four instalments of \$2,000, maturing, respectively, May 1, 1921, and January 1, 1922, 1923 and 1924, with interest at 5½ per cent. per annum from

June 1921, and, if not paid at maturity, at 7 per cent. per annum from maturity until paid. There were further provisions respecting a monthly amount that should be paid to the plaintiff until the maturity of her first alimony instalment May 1, and credited against the same, and for the support of the minor children and her approaching confinement, which items need not be further noticed here.

In January, 1921, the judge who had tried the case and rendered the decree retired from office and was succeeded by another judge before whom the later proceedings herein considered were had. The case was originally tried upon the petition, answer, and reply of the parties, both parties producing testimony and the trial lasting two days. No appeal was taken by either party.

Afterwards, on February 5, 1921, the defendant filed in the district court a petition to vacate or modify said decree. On April 13, following, he filed his amended petition, to which the plaintiff on June 20 filed answer. No reply seems to have been filed, but on June 20 a hearing was had and the court entered an order providing that the findings and decree of December 1, 1920, for alimony and other allowances, except in so far as they had been complied with by the defendant, were set aside and discharged and he and his property released therefrom, and further providing that the amount of alimony for plaintiff and of allowance for the support of plaintiff and her children were reserved by the court for its future consideration and judgment, and without prejudice to either party upon the hearing of defendant's application to vacate the decree of divorce. The parties were also given ten days in which to file affidavits and make additional showing to be used in the hearing of defendant's application to set aside the divorce decree. On September 27 at the same, or June, 1921, term, a further hearing was had and an order entered overruling the application of the defendant to open and set aside the decree of divorce, making certain

specific findings as to the property and indebtedness of the defendant, and providing that defendant pay \$40 a month beginning October 1, 1921, \$20 thereof to be used for the support of the plaintiff and \$20 for the support of the three minor children in her custody.

The June term of said court adjourned *sine die* October 1, and thereupon plaintiff undertook to settle a bill of exceptions which was submitted to adverse counsel on December 13. It was finally settled December 24, but in so doing was divided into three parts designated as: (1) The evidence upon the application to set aside the judgment for alimony and allowance for support of children; (2) the evidence upon hearing of defendant's petition to set aside the decree of divorce; and (3) the evidence upon the hearing of plaintiff's application for allowance of alimony and support of the minor children.

The appeal was filed in this court December 19, 1921, and the brief of appellant on March 23, 1922. In this court the appeal was submitted upon the brief and argument of appellant only, but in the meantime, on June 1, 1922, motions were filed on behalf of the appellee to dismiss the appeals and suggesting diminution of the record, the defendant presenting a further order of the district court made December 1, 1921.

It is contended by the appellee that the said order of June 20 was a final order, and, no appeal having been prosecuted therefrom within the time allowed by law, the same should not be considered nor the bill of exceptions allowed. It is further contended that the order of September 27, in so far as it refused to set aside the divorce decree, was in appellant's favor and she could not complain of that, and that, in so far as it fixed an allowance in the nature of alimony for the support of plaintiff and the children, it had been vacated and superseded by the order of December 1, 1921, and hence furnished no basis for appeal.

As stated, the June term of court adjourned October 1. This order of December 1, 1921, was made at a

subsequent term, and also appears from the record to have been made without application by, or notice to, either of the parties to the case, or in their presence, and there is disclosed no basis of either pleading or evidence for the same; hence, although it purports to relieve the defendant from payment of the allowance designated by the order of September 27, until further order of the court, it is considered as of no validity and will not be given further attention in this discussion.

The real question involved in this appeal is as to the authority for, or propriety of, the modification of the original decree by which it was undertaken to eliminate the allowance of \$8,000 permanent alimony; and the question whether the order of June 20, 1921, was final or interlocutory, and its status as affected by the appeal sought to be taken from the order of September 27.

With reference to the action of June 20, 1921, it was argued by the appellee that, under the authority of *Beard v. Beard*, 57 Neb. 754, *Wunrath v. Peoples Furniture & Carpet Co.*, 98 Neb. 342, and *Bannard v. Duncan*, 65 Neb. 179, the same was a final order. We think, however, that the proper practice has been fairly well defined by cases more closely applicable. In *Everson v. Everson*, 101 Neb. 705, the scope of the act of 1909 (Comp. St. 1922, sec. 1555) was considered and held to be to extend the jurisdiction of the trial court over such cases for the period of six months after decision, as it otherwise had during term time. An order made within such period was held not final or appealable. The later case of *Blakely v. Blakely*, 102 Neb. 164, seems to apply the rule in instances where the application for modification is made during the six months' period although acted upon at a later date. Without determining this question, we think that the nature of this order itself, as disclosed by its own terms, indicates that it was not, and could not be, a final order. It expressly reserves the very thing which was the point of contention for the future consideration and judgment of the

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court. This court held in *Howell v. Howell*, 89 Neb. 243, that such a decree is usually within the control of the court during the term at which it is rendered, and if the court believes it necessary in the interests of justice to open it up and allow further evidence to be taken at the same term, the matter is entirely within its discretion; and in *Huffman v. Rose*, 72 Neb. 57, that an order is not final when the substantial rights of the parties involved in the action remain undetermined and when the case is retained for further action. In such case the order is interlocutory. When no further action of the court is required to dispose of the case, the order becomes final, and from which an appeal or proceedings in error will lie. Applying this rule and having regard to the provisions of the order itself, we must hold that the order in question of June 20 was, for the purpose of appeal, interlocutory, and not final. It follows that the appeal from the judgment or order of September 27 brought up the whole case, and it is now before us upon the question of the modification of the decree.

Looking, now, to the contents of this application for a modification of the decree, we find that it is based, not upon any new cause or subsequent event arising or taking place after the trial, but upon things alleged to have taken place during the trial itself and in connection therewith. The import of the allegations is to the general effect that much of the testimony on plaintiff's behalf was untrue, and that the trial court was misled thereby in making its findings and decree. The court, as constituted at the time of the hearing now under review, had not heard the testimony given at the trial nor seen the witnesses; neither was such testimony before the court in the form of a transcript thereof or otherwise. The bill of exceptions, or the part thereof which is herein designated as containing all the evidence submitted upon that phase of the case, includes only the amended petition of the defendant to vacate the decree, the answer of the plaintiff thereto with exhibits

attached, and the affidavits of three persons upon the value of defendant's land, which place the same at \$200 an acre. The trial court originally found defendant's net worth to be \$25,000. The evidence contained in this bill of exceptions does not disclose anything as to the value of his personal property, and was wholly insufficient to justify the modification of the alimony judgment.

So far as concerns the modification of the monthly allowance for the support of the wife and the children, that was by statute placed under control of the court, and was perhaps within the authority of the court and should not be disturbed, except in so far as is hereinbefore indicated with reference to the effect of the order of December 1, 1921.

The parties are entitled to a determination of their rights, and, in view of the circumstances of this case, a judgment will be entered in this court that the amount of the original decree for the sum of \$8,000 permanent alimony in favor of the plaintiff be reinstated as of December 1, 1920, payable \$2,000, May 1, 1921, and \$2,000, January 1, 1922, and a like amount January 1, 1923, and January 1, 1924, the same bearing interest at 5½ per cent. per annum from June 2, 1921, to maturity, and 7 per cent. per annum thereafter; subject, however, to a deduction of \$465, paid on the instalment first maturing, making the net amount of that instalment for which judgment is rendered \$1,535; and also reinstating as of September 27, 1921, the award of \$20 to be paid to the clerk of the district court for plaintiff monthly beginning October 1, 1921, for the support of the minor children, this monthly amount subject to future modification by the court as by law provided. Costs in the case and on this appeal are taxed to the defendant.

The several judgments and orders of the district court are modified accordingly.

JUDGMENT MODIFIED.

Steenbock v. Omaha Country Club.

ADOLPH H. STEENBOCK, APPELLEE, v. OMAHA COUNTRY CLUB, APPELLANT.

FILED SEPTEMBER 22, 1923. No. 22167.

1. **Negligence: INJURY: PROXIMATE CAUSE.** "The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred." *Spratlen v. Ish*, 100 Neb. 844.
2. ———: ———: ———. It is not sufficient that the negligence charged furnishes only a condition by which the injury is made possible, for if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury.
3. ———: ———: ———. The negligent placing of a flagpole across its driveway by the defendant Omaha Country Club, which flagpole was thereafter knocked against plaintiff's back by the careless and negligent driving of defendant Crofoot's car, thereby causing plaintiff's injury, is not the proximate cause of such injury.
4. ———: DIRECTION OF VERDICT. The pleadings and evidence do not disclose facts creating a liability in favor of plaintiff and against the defendant Omaha Country Club, and the defendant's motion for a directed verdict in its favor should have been sustained.

APPEAL from the district court for Douglas county:
L. B. DAY, JUDGE. *Reversed, with directions.*

Kennedy, Holland, De Lacy & McLaughlin, for appellant.

Jefferis, Tunison & Wilson, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and DEAN, JJ., COLBY, District Judge.

COLBY, District Judge.

This action was brought by the plaintiff, a minor about 15 years of age, by his father and next friend, against the Omaha Country Club and Ludovic C. Crofoot for injuries sustained by plaintiff while employed as a caddy at said club.

The petition alleges that the injuries complained of were the result of an automobile being driven by the chauffeur of defendant Crofoot against a flagpole owned

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by the country club, which its employee, for the purpose of repair, had taken down and laid across a driveway on the grounds of said club. It is further alleged in the petition that the plaintiff was waiting for employment during his term as a caddy and sitting near the east end of the flagpole, and that the chauffeur of defendant Crofoot negligently propelled and directed an automobile along the driveway, failed to exercise ordinary care or to observe or discover such flagpole and negligently ran into the same; that such negligent act caused the car to strike the flagpole with great violence, inducing the slender part thereof to strike plaintiff in the back, thus producing the injuries complained of; that the negligent acts of the defendant Omaha Country Club in placing its flagpole across the driveway, and the negligent acts of defendant Crofoot, through his chauffeur, concurring, were the proximate cause of the plaintiff's injuries.

Before the trial of the case defendant Crofoot settled with plaintiff for the injuries complained of by the payment of the sum of \$1,260.

The evidence upon the trial seemed to support the main facts alleged in the petition regarding the placing of the flagpole across the driveway by defendant Omaha Country Club and the failure of defendant Crofoot to exercise ordinary care in the driving of his machine or to observe or discover said flagpole, and that he carelessly and negligently ran into the same, and that the running into said pole by said car knocked the same against the back of plaintiff and thus produced the injuries complained of.

There were a number of defenses interposed by the defendant Omaha Country Club, but the controlling question at issue is whether the placing of the flagpole across the driveway of the country club or the knocking of the pole against plaintiff's back by the car of defendant Crofoot was the proximate cause of the injuries to plaintiff, and the decision of this question is of im-

portance and will practically make a consideration of the other matters unnecessary.

To constitute proximate cause, under authority of the adjudicated cases, the injury must be the natural and probable result of the negligence, and be of such a character as an ordinarily prudent person could have known, or would or ought to have foreseen might probably occur as the result. It is not sufficient that the negligence charged does nothing more than furnish a condition by which the injury is made possible, and if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury. There may have been carelessness and negligence on the part of the country club in placing the flagpole across its driveway, but this, in itself, no matter how careless and negligent it might be, would not and could not alone cause the injury.

It is alleged in the petition and supported by the evidence that the carelessness and negligence of the chauffeur of defendant Crofoot caused the striking of the automobile against the flagpole, knocking the same against the back of plaintiff, thus producing the injuries complained of, and while the country club may have been careless and negligent in the placing of the flagpole across its driveway, this, in itself, without any other cause or condition, would not produce the injury. The pole, in itself, lying across the roadway would not produce any injury, but if negligently run into, as the plaintiff alleges happened in this case, an accident would result. From this it would appear that the pole simply furnished a condition, but that the real proximate cause of the accident was the carelessness and negligence of the chauffeur of the Crofoot car in running into the pole.

The failure of the country club to put up a notice or erect a barricade cannot be considered as the proximate cause of the accident. In order for the plaintiff to recover damages for its alleged negligence, the plain-

tiff must prove both the negligence of defendant country club and that such negligence was the proximate cause of the injury complained of. In this case it does not appear that the injury to plaintiff resulted from the negligence of the country club, if it was negligent in placing the flagpole across its driveway. This alleged negligence of the defendant country club plainly might have existed for years without any injury to plaintiff, had it not been for the negligent act of defendant Cro-foot's chauffeur in the operation of his car.

In *Cole v. German Savings & Loan Society*, 124 Fed. 113, Judge Sanborn, in his opinion, says on the subject of proximate cause: "It is now no longer difficult to determine whether or not the acts of the defendant were the proximate cause of the injury to the plaintiff. Wharton (Negligence, sec. 134) says: 'Supposing that, had it not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of responsible human action. I am negligent on a particular subject-matter as to which I am not contractually bound. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured.'"

Bishop, on Non-Contract Law, sec. 42, says: "If, after the cause in question has been in operation, some independent force comes in and produces an injury not its natural or probable effect, the author of the cause is not responsible."

In the case of *Thubron v. Dravo Contracting Co.*, 85

Atl. 292 (238 Pa. St. 443), it is said in the second paragraph of the syllabus as follows: "The mere concurrence of a person's negligence with the proximate and efficient cause of an accident will not create liability."

In 29 Cyc. 496, the text is as follows: "A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated, and efficient cause of the injury. If no danger existed in the condition except because of the independent cause, such condition was not the proximate cause."

In *Elliott v. Allegheny County Light Co.*, 54 Atl. 278 (204 Pa. St. 568), the syllabus is as follows: "In an action by a painter to recover for injuries received, where the evidence shows that he fell from a ladder and clutched at a live electric wire, and was shocked thereby, he is not entitled to recover from the electric light company, which left the wire uninsulated, the fall from the ladder being the proximate cause of the injury."

In *Independent Ice Cream Co. v. United Ice Cream Co.*, 125 N. Y. Supp. 1106, the second paragraph of the syllabus is as follows: "Where the negligence of one party is merely passive and potential, while that of the other is the moving and effective cause of the accident, the latter is the proximate cause."

This court has recognized and adopted the same principle on the question of proximate cause. In *Spratlen v. Ish*, 100 Neb. 844, the defendant was charged with maintaining a defective and improperly drained gas pipe in which the moisture in the gas froze and stopped the gas. The gas company's employee put alcohol in the pipe to thaw it out and at night it was thawed out, but the gas company's man left the gas jet open and plaintiff's husband was asphyxiated. The lower court

directed a verdict for the defendant company, and this court, in affirming the case, say:

“Was the alleged negligent plumbing the proximate cause of the injury? If this question is answered in the negative, it is unnecessary to determine the rights of landlord and tenant. The alleged negligence, it will be noted, consisted in permitting one of the gas pipes to sag so that it did not drain properly, and the liquid therein froze and shut off the flow of gas which was desired for illuminating purposes. Had the gas jet been left closed, this would merely have caused inconvenience in lighting the house, but would have caused no other injury. Asphyxiation does not occur from shutting off the flow of gas, but from permitting it to escape. No stretch of the imagination will permit a holding that asphyxiation of plaintiff's decedent was the natural and probable result of such plumbing. If it was not, plaintiff is not entitled to recover.”

The law on this subject seems to be fairly well settled. The best considered authorities hold that an injury which could not have been foreseen or reasonably anticipated as the probable result of the negligence is not actionable, nor is an injury that is not the natural consequence of the negligence complained of, and would not have resulted from it, but for the interposition of some new, independent cause that could not have been anticipated. The concurring negligence of another cannot transform an act of negligence, which is so remote a cause of injury that it is not actionable, into a cause so proximate that an action can be maintained upon it. It cannot create a liability against one who does not legally cause it, nor make an injury the natural and probable result of a prior act of negligence which was not, or would not have been, such a result in its absence. *Chicago St. P., M. & O. R. Co. v. Elliott*, 55 Fed. 949, 20 L. R. A. 582; *Cole v. German Savings & Loan Society*, 124 Fed. 113, 63 L. R. A. 416.

The defendant Omaha Country Club, in instruction

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No. 1, moved the court to direct the jury to find a verdict for the defendant, and under the rules of practice this was the authorized mode of procedure to obtain the relief sought. This court held in *Benson v. Peters*, 82 Neb. 189, that this was the proper course to pursue. The syllabus is as follows: "In an action to recover damages for a personal injury, the defendant is entitled to a directed verdict when the evidence is insufficient to show that the alleged negligence was the proximate cause of the injury."

The defendant's motion for a directed verdict should have been sustained. Under the law, the pleadings, and the undisputed evidence, the plaintiff cannot recover. and this case should be reversed and remanded, with instructions to the district court to dismiss plaintiff's action.

Reversed and remanded, with instructions to dismiss.

REVERSED.

DURLAND TRUST COMPANY, APPELLEE, v. CHARLES AUGUSTYN ET AL., APPELLANTS: JONAS VAN WIE, CROSS-PETITIONER AND APPELLEE.

FILED SEPTEMBER 22, 1923. No. 22484.

1. **Vendor and Purchaser:** DEFAULT OF VENDOR: RECOVERY OF PAYMENTS. When a vendor of land under a contract of sale sells and conveys such land to another and is unable to comply with the terms of his contract, the vendee is entitled to recover back any payments made on the purchase.
2. **Forfeiture:** RECOVERY OF PAYMENTS. If the vendor conspires to hinder and delay the vendee in the performance of the terms of such contract on his part, and thus prevents the prompt payment of the remaining purchase price on the day it is payable, he is not entitled to have a forfeiture of the payments made, but the vendee may recover or have decree for cancelation of a note and mortgage given as advance payments under the contract and may be relieved from further obligation.

APPEAL from the district court for Garfield county: BAYARD H. PAINE, JUDGE. *Reversed, with directions.*

Guy Laverty and Bert M. Hardenbrook, for appellants.

Mapes, McFarland & Mapes, Davis & Davis, T. B. Dysart and Price & Price, contra.

Heard before MORRISSEY, C. J., ALDRICH, DAY and GOOD, JJ., COLBY and REDICK, District Judges.

COLBY, District Judge.

This is an action by Jonas Van Wie, cross-petitioner and appellee, to foreclose a real estate mortgage of \$3,000. A decree in the suit was entered in favor of the plaintiff Durland Trust Company upon its petition, and in favor of defendant M. D. Cameron upon his cross-petition, each for the foreclosure of their separate mortgages. No objection is made nor is there any contest or issue between the several parties as to these two foreclosure decrees, the only question being as to the foreclosure of the \$3,000 real estate mortgage and the issues made by the cross-petition of Jonas Van Wie, the answer and cross-petition of appellants Charles Augustyn and wife, and the reply of cross-petitioner Van Wie thereto.

The undisputed facts appearing in the record are substantially as follows: On July 27, 1920, the cross-petitioner Jonas Van Wie, and Ida Van Wie, his wife, entered into a written contract with appellant Charles Augustyn, whereby they contracted and agreed to sell to said Augustyn 356 acres of land situated in Greeley and Valley counties. Appellants Augustyn and wife executed and delivered to the cross-petitioner, Van Wie, a note for \$3,000, and to secure said note executed a real estate mortgage. This note and mortgage were given as the first payment upon the land under the contract of sale and purchase and are the instruments set up in the cross-petition of Van Wie and sought to be foreclosed in this action.

According to the contract the transaction was to be finally consummated on the 1st day of March, 1921, by the delivery of abstract and deed and the payment of the remainder of the purchase price, unless an extension of time was had by reason of defects in the abstract.

The transaction, however, was never consummated, being given up by both parties, and the 356 acres of land were sold and conveyed by Van Wie to J. B. Ramel in the fore part of March, 1921. It also appears from the record that Augustyn, shortly after making his contract with Van Wie, made a contract for the sale of this same land to said J. B. Ramel, which was to be consummated on March 1, 1921.

The contract between Van Wie and Augustyn provides that Van Wie, ten days prior to March 1, 1921, is to furnish Augustyn an abstract showing good, marketable title free of all liens and incumbrances, including taxes for 1920 and all prior years, except a mortgage of \$30,000, which was then on said premises and which was to be assumed as a part of the consideration; and it was further agreed that, in case any corrections should be found necessary in the abstract of title, Van Wie should be allowed a reasonable time, not exceeding 30 days, in which to make such corrections and comply with the conditions of the contract as to furnishing an abstract. The conveyance of the land from Van Wie to Augustyn was to be by warranty deed delivered at the First National Bank of Ord, Nebraska, and all remaining payments were to be made at said place.

It further appears from the record that no abstract of title was furnished by Van Wie at any time, no deed was deposited in the First National Bank of Ord, nor did Augustyn pay any part of the consideration for the lands excepting the \$3,000 note and mortgage in controversy, which were delivered at the time of the execution of the contract. No special provision is made in the contract that time is to be of the essence of the contract, the only requirements being that the deed and abstract and the consideration of \$24,500 remaining unpaid, after the assumption of the \$30,000 mortgage already on the land and the giving of the \$3,000 note and mortgage, were to be turned over on March 1, 1921. The contract also contained the following provision:

"It is further agreed that in case the said second party (Augustyn) shall fail on his part to perform the conditions of this contract by him to be done and performed, and shall fail to pay said deferred payments at the time and in the amounts herein set forth, then in such case the said first parties (Van Wie) shall retain the said \$3,000 paid under the provisions of this contract as their liquidated damages for failure on the part of the second party to perform said contract; and it is further agreed that in case the said first parties shall on their part fail to perform the conditions of this contract and to convey said premises under its terms and at the time and place therein set forth, then and in such case they agree to and will repay said \$3,000 to second party and will pay the said second party the further sum of \$3,000 as liquidated damages by reason of the failure of the said first parties to comply with their said contract, and upon the payment of said amounts this contract shall terminate and both parties be released from all obligations thereunder. It being mutually agreed by the parties hereto that said provisions for the payments of the said sums of \$3,000 by each of said parties is to be treated and considered as liquidated damages, and not as a penalty, and the agreement is made to avoid the expense and trouble in proving damages in case either of said parties fail to comply with the terms of this contract."

It further appears in evidence that the contract made by Augustyn with J. B. Ramel required the payment of \$17,900 cash on March 1, 1921. Van Wie testifies that sometime in February, 1921, he had a conversation with Augustyn, and that Augustyn said, "I don't know where the money is coming from." He further testifies that later on he had another talk in which Augustyn wanted Van Wie to take some kind of security other than the payment of the \$24,500 in money, but there was no agreement to modify the terms of the contract, but Augustyn denies that he had any such conversations with Van Wie.

There is testimony on one side, which is denied on the other, that Augustyn said he did not believe that Ramel would be able to make the payment of \$17,900 by March 1, 1921, and he tried to arrange some way to obtain a deed from Van Wie so he could collect the forfeiture from Ramel provided for in their contract, but there was no consummation of this agreement. Van Wie testified that he was ready and able to comply with the contract and had his wife in town to sign the necessary deed, but that he did not comply with the contract because Augustyn told him that he could not make the payment. This statement Augustyn also denied, and testified that he was able to comply with the contract and make the payments on March 1, 1921; that he expected to get the \$17,900 from Ramel, and that he had the other money ready.

It does not appear from the record that Augustyn demanded the deed and abstract or that Van Wie demanded the payment of the money on the 1st of March, 1921. It appears, however, that Augustyn came to town on March 1, 1921, for the purpose of closing up the contract with Van Wie, and also for the purpose of closing up his contract with Ramel, from whom he was to receive \$17,900 in money; that he had only \$6,000 in cash and expected to get the other from Ramel. The evidence is meager on both sides and somewhat conflicting as to what was said and done between Van Wie and Augustyn on March 1, 1921, when they were both in town. Augustyn testifies, in substance, that he had the money to pay the whole \$24,500, but expected to get \$17,900 from Ramel. Augustyn further testifies as follows: "Q. You say you got away? A. No; they got away. I wasn't far enough down; * * * they went up to Mr. Davis' office; I followed up there and asked Jonas Van Wie if they were ready to complete the deal. They didn't say nothing. After a while they go out and told me that I am out; they are making a deal between themselves. Q. Who told you this? A. Mr. Jonas Van Wie. Q. What

did you do? A. I just walked out. Q. Were you on the 1st of March, 1921, willing to comply with the conditions of this contract? A. Yes; yes; yes. Q. And did Jonas Van Wie or any one for him ever offer or tender to you an abstract of the land in this contract? A. No. Q. Did Jonas Van Wie or any one for him ever offer or tender to you a deed for the land described in this contract? A. No. * * * Q. Did Mr. Van Wie on the 1st day of March, 1921, demand of you at any time to close this deal? A. No. Q. Did he demand the balance of the payment under this contract? A. No, sir. Q. Did he tell you at any time on the 1st day of March that he was ready to close up the deal? A. No, sir. Q. Has he ever told you that? A. No, sir.

It is further shown in the evidence, and not contradicted, that on the afternoon of the 1st of March, 1921, at about 4 o'clock, Van Wie entered into a contract with J. B. Ramel for the sale of this land to the said Ramel; a copy of said contract being introduced in evidence and bearing the false date and false certificate of acknowledgment of March 2, 1921; but the parties on the witness-stand testified that the same was made the day before. In this contract the purchase price was fixed at \$45,240, a part of which was taken in trade for other lands, while in the contract between Augustyn and J. B. Ramel for the same property the purchase price was fixed at \$71,200, a part of which was taken in trade for other lands, and the purchase price in the contract between Van Wie and Augustyn, under their contract for said land, was \$57,500.

The appellants present two propositions of law which they contend are applicable to this case, viz: First. Where a vendor fails to perform the conditions of his contract and sells to another, he thereby terminates his contract, and the vendee is relieved from all liability and entitled to recover back any money paid. Second. Where a vendor fails to tender an abstract and deed, the vendee is not in default until such tender; and if vendor sells to

another without tendering deed there is no default on the part of vendee, but he is relieved from liability and can recover back any money paid. In support of the first proposition the case of *Eaton v. Redick*, 1 Neb. 305, is cited, and in support of the second proposition the cases of *Adler v. Kohn*, 96 Neb. 346, *Patterson v. Murphy*, 41 Neb. 818, *Gillilan v. Rollins*, 41 Neb. 540, and other cases are cited.

Counsel for appellee Van Wie present two propositions of law in answer to those of appellants as applicable to the case from appellee's standpoint, the first of which is as follows: When a contract for the sale of real estate provides that upon nonperformance by the vendee the vendor may retain a payment made thereon as liquidated damages, the vendee cannot recover back the amount of such payment, unless he proves that he was able and ready to perform the contract on his part. Counsel for appellee cite the following cases in support of this proposition: *Patterson v. Murphy*, 41 Neb. 818; *Maloy v. Muir*, 62 Neb. 80; *Lowry v. Robinson*, 3 Neb. (Unof.) 145; 39 Cyc. 2025, 2047; *Battle v. Rochester City Bank*, 3 N. Y. 88.

The second proposition of law contended for by appellee is that where the purchaser repudiates a contract, or states that he cannot perform, the fact that the vendor has failed to tender a deed and abstract will not entitle the vendee to recover payments made by him on the contract, as the law does not require a vain act and a tender in such case is unnecessary. In support of this proposition the following cases are cited: *Johnson v. Higgins*, 77 Neb. 35; *Wasson v. Palmer*, 17 Neb. 330; 27 R. C. L. 529, sec. 259; 39 Cyc. 1377, 1541.

There is really little or no dispute about the law generally applicable to contracts for the sale of real estate, but the question is, which propositions of law advanced by the respective parties are applicable to the evidence in the case at bar? From the evidence preserved in the record it plainly appears that Charles

Augustyn did not desire nor intend to repudiate his contract with Jonas Van Wie, but that he came to town on the 1st of March, 1921, with the purpose, expectation and intention of completing such contract, and did not relinquish the idea of such completion until the afternoon of said day when he understood he was obliged to and was told by Van Wie that he was out, and that Van Wie and Ramel were making a deal between themselves for the same land.

We are further convinced from the evidence contained in the record that Van Wie did not on his part desire to complete the contract with Augustyn and did not intend to do so if he could avoid it. After making the contract with Augustyn and before the end of the time for its consummation, he entered into negotiations and signed a written agreement with J. B. Ramel for the sale of the same property to Ramel and for a less price than that for which he had sold it to Augustyn and at a much less price than that for which Augustyn had sold the same property to Ramel. This, on its face, would be an improper inducement for Ramel to go back on his contract with Augustyn.

It appears that Jonas Van Wie was an experienced and shrewd real estate dealer and that he had attorneys to advise and assist him in this transaction, while on the part of Augustyn it is just as plain that he was inexperienced in such business transactions, was not educated and understood the English language only imperfectly, and that he had no attorney or legal counsel to advise or assist him in this important business matter; and yet it appears that he had the confidence of banks and others having money to loan and who were willing to advance for him the necessary funds when required to complete the deal. Augustyn testifies, in substance, that he was to get \$17,900 of the \$24,500 from Mr. Ramel under his contract with him, and that he had \$6,000 in cash, but that if Ramel did not pay him the amount due on the 1st of March he could and would have gotten this amount from

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his friend, who was a banker and who would have let him have it.

There is nothing in the record tending to show the bad faith of Augustyn or his desire not to comply with the contract; while, on the other hand, there is convincing evidence that Van Wie, by his conversations with Augustyn, by his failure to furnish an abstract and deed, and by his entering into a contract for the sale of this same land with J. B. Ramel on the afternoon of March 1, 1921, in which he made it to the interests of Ramel not to comply with his contract with Augustyn, was desirous of and using his best endeavors not to comply on his part, and also to prevent Augustyn from complying with the contract between them. It is very evident that Van Wie was making it to the interest and advantage of Ramel not to furnish the \$17,900 to Augustyn on the 1st of March, 1921, as he had agreed, so as to render Augustyn unable to make the cash payment at that time of \$24,500. On the one hand, we have the honest endeavor and desire of an inexperienced and unlearned man, without legal counsel, to comply with his obligations; while, on the other hand, we have an intelligent and experienced real estate agent, acting under the advice of legal counsel, endeavoring to hinder, delay and prevent the consummation of the contract, and thereby enable him to retain and recover the forfeiture of the \$3,000 note and mortgage which is sought to be foreclosed in this action. The conduct and actions of Jonas Van Wie, as they appear from the record evidence preserved in the bill of exceptions, clearly show duplicity and double dealing and savor very strongly of fraud. By his questionable conduct he was endeavoring to prevent a compliance with the contract by Augustyn for the purpose of enabling him to obtain an undue advantage and a forfeiture of the \$3,000 note and mortgage received as part of the purchase price. There is nothing in the evidence to show that J. B. Ramel would not have complied with his contract of purchase with Augustyn and

paid over the \$17,900 on the 1st of March, 1921, as he had agreed, had it not been for the machinations of Van Wie, who excited his cupidity by entering into a written contract with him by which he was to make several thousand dollars by such noncompliance.

In *Reiger v. Turley*, 151 Ia. 491, 501, the supreme court of Iowa say: "The law abhors forfeitures and will give them effect with reluctance and only when the right thereto has been clearly contracted for, and where the party claiming it has complied with all conditions imposed upon him by the contract or by the statute."

This court has given its sanction to the doctrine that forfeitures are looked upon with disapproval, and equity will generally relieve against them, especially where there is no evidence of loss or damage.

In *Springfield F. & M. Ins. Co. v. McLimans & Coyle*, 28 Neb. 846, this court used the following language: "Forfeitures are not favored, and should not be enforced unless the courts are compelled to do so."

In *Hanover Fire Ins. Co. v. Gustin*, 40 Neb. 828, 838, this court stated: "Forfeitures are odious in law and should never be enforced unless the court is compelled to do so." See *Adler v. Kohn*, 96 Neb. 346.

This court will not confirm a forfeiture induced by duplicity and overreaching. From the record it is plain that Augustyn honestly intended, expected and endeavored to comply with the terms of the contract on his part to be performed, but was prevented by the questionable conduct of Van Wie. The propositions of law presented by counsel for appellants Augustyn are applicable to the proofs, as we view them, contained in the record as it comes to us. With this view of the proofs and the law, we find generally for the appellants Charles Augustyn and Mary Augustyn, and against the cross-petitioner and appellee Jonas Van Wie; we find that neither party is entitled to a judgment of forfeiture; that the contract of purchase between Jonas Van Wie and Charles Augustyn should be set aside, as it has been aban-

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done and its terms not complied with by either party; and that the \$3,000 note secured by mortgage given by Charles Augustyn and wife, sought to be foreclosed in this action, should be canceled and the record thereof released in the offices of the registers of deeds of Greeley and Valley counties.

The decree of the lower court is reversed and the cause remanded, with instructions to the district court for Garfield county to enter a decree in accordance with the findings of this court.

REVERSED.

ALBERT RATH ET AL., APPELLEES, V. BESSIE WILGUS ET AL.,
APPELLANTS.

FILED SEPTEMBER 22, 1923. No. 22493.

1. **Trial:** EQUITY CASES. In equity cases and in those involving both law and equity, the district court is authorized to submit all questions of fact to a jury, and it is not error to refuse to separate the law from the equity and try the issues of the former to a jury and of the latter to the court.
2. **Vendor and Purchaser:** TITLE: ABSTRACT. An abstract showing a mortgage barred on its face by the statute of limitations, but not released of record, does not show a perfect record title, and the purchaser may be justified in rejecting it, as the statute may have been tolled by some act of the parties not appearing of record.
3. ———: ———: ———. An abstract of title showing that a release of an old mortgage was entered in the registration and numerical index, but that such release was not of record, does not show a good title of record.
4. **Mortgages:** RELEASE: EVIDENCE. The statutes of Nebraska do not make the entries in the numerical index evidence of the facts therein noted, and a reference in such index to the filing of a release cannot be considered as proof of the release of such mortgage.
5. ———: RECORD. Section 5625, Comp. St. 1922, requires that releases of real estate mortgages shall not only be indexed but recorded at full length, and to constitute a valid record the statute must be complied with.
6. **Vendor and Purchaser:** FAILURE OF TITLE: RECOVERY OF PAY-

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MENT. *Held*, that the abstract did not show a good title of record, and that, as none was furnished by the vendors within the time limited for the completion of the contract, the vendees were entitled to recover back the amount paid by them under the contract.

APPEAL from the district court for Hitchcock county:
CHARLES E. ELDRED, JUDGE. *Affirmed*.

Roper & Shaw, for appellants.

Grant G. Martin and Stewart, Perry & Stewart, contra.

Heard before MORRISSEY, C. J., ALDRICH, DAY and GOOD, JJ., COLBY and REDICK, District Judges.

COLBY, District Judge.

This action was begun as an action at law to recover \$1,200 paid by appellees to appellants upon a land contract, the terms of which were not complied with. The appellants filed their answer, in which they set up certain defenses and a cross-petition, praying for specific performance of the contract.

In the contract appearing in the record between appellants and appellees the former undertook to sell a half section of land in Hitchcock county for \$22,400, payable \$1,200 in cash, which was paid by appellees, \$10,000 on surrender of deed and acceptance of title, and \$11,200 on March 1, 1921, on presentation of good title. The contract provided that appellants were to furnish appellees a warranty deed and a good and sufficient abstract of title showing good title of record on or before March 1, 1921. The contract further contained the agreement that time was an essential element of the contract.

Appellees alleged in their petition due execution of the contract, payment of \$1,200 in cash, their readiness and ability to perform on their part, tender of performance, demand for deed, failure of appellants to perform, insufficiency of title of record in appellants on March 1, 1921, and inability to deliver deed conveying good title of record, and they ask judgment for the \$1,200 advance payment with 7 per cent. interest from September 4, 1920.

The district court overruled appellants' motion for a separate trial before the court without a jury on the issues presented in the cross-petition for specific performance and required appellants to proceed to trial before a jury on both issues. The jury returned a verdict for appellees for \$1,291.35, for which judgment was entered by the court on October 22, 1921, from which an appeal is taken to this court.

We think there is no error in the trial of the issues involved in the whole case to the jury, as the court, in equity cases, has the right to submit questions of facts to the jury. Comp. St. 1922, sec. 8787; *Alter v. Bank of Stockham*, 53 Neb. 223; *Schumacher v. Crane-Churchill Co.*, 66 Neb. 440.

The case, as we have stated, started out as a law case for the recovery of \$1,200 and interest, then by the cross-petition the specific performance of the contract was asked, but the whole matter, under our practice, could be submitted to the jury for its finding, which was done by the court without taking the trouble to separate the law from the equity matters.

The main controversy in this action seems to be in regard to the furnishing of an abstract of title showing a good title of record in the appellants. The old mortgage of \$2,000, the release of which is claimed to be defective, appears on its face to be barred by the statute of limitations, yet this is such a defect in the record title that a purchaser may be justified in rejecting the title. *Justice v. Button*, 89 Neb. 367; *Adler v. Kohn*, 96 Neb. 346, 354.

It is a general rule of law that a purchaser of real estate covered by a mortgage apparently barred by the statute of limitations will not obtain a marketable title, one free from reasonable doubt, as the statute may have become tolled by some act of the parties not appearing in the record. *Austin v. Barnum*, 52 Minn. 136; *Zorn v. McParland*, 28 N. Y. Supp. 485, affirmed in 32 N. Y. Supp.

770; *Whittier v. Gormley*, 3 Cal. App. 489; *Reynolds v. Strong*, 31 N. Y. Supp. 329.

The record shows that the defendants commenced an action to quiet title and to obtain a release of the old \$2,000 mortgage in question some months after the time had expired for the consummation of the contract. As time was made by such contract an essential element, it was not necessary for the appellees to make a tender of the balance of the purchase price before rescinding, they being willing and able to perform their part of the contract had the appellants been able to perform their part. Where time is an essential element of the contract, made so by an express provision therein, a court of equity will refuse to enforce specific performance, unless strict performance has been waived. *Brown v. Ulrich*, 48 Neb. 409; *Langan v. Thummel*, 24 Neb. 265; *Morgan v. Bergen*, 3 Neb. 209.

Unless the contract provides that the vendee shall have a reasonable time to perfect his title after the time limited, no time can be allowed to cure defects, where time is made of the essence of the contract, and title tendered under the contract must be a good title of record, or the vendee is not compelled to accept. *Ballou v. Sherwood*, 32 Neb. 666.

The abstract of title showed that a purported release of the old \$2,000 mortgage was entered in the registration and numerical index, but that such release was not of record. We find no provision in our law making the entries in the numerical index evidence of the facts therein noted, but on the contrary section 5625, Comp. St. 1922, requires that releases of real estate mortgages shall not only be indexed, but that they shall be "recorded at full length," and that in the record of discharge the register of deeds shall make a reference to the book and page of such record. To constitute a valid record the statutes must be complied with. A reference made in the numerical index to the filing of a release cannot be considered as a record of the release of such mortgage. The

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curative statutes of this state do not reach such defects. Where there is an entire failure of the recording officer to place a release of record, the curative acts do not do away with the necessary requirements of the law. The abstract did not show a release of the mortgage.

We hold that an abstract showing a good title of record was not furnished by vendors within the time required under the contract, which makes time of the essence of such contract, and hence that the appellees were entitled to recover back the amount paid under the contract.

The proceedings and judgment of the district court should be, and are hereby,

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. HOLDREGE STATE BANK
ET AL., APPELLEES.

FILED OCTOBER 1, 1923. No. 23443.

1. **Appeal:** PROCEDURE. Where the district court has entered an order allowing a claim against a receiver of an insolvent state bank and directing payment of the claim from the depositors' guaranty fund, and, on application by the state for a vacation of such order and for permission to make defense to the claim, enters an order setting the hearing on the application upon a future date, also by the order suspends the first order until the further action of the court, and, on the subsequent hearing, announces that the hearing will be on the merits of the claim, and at such hearing the court and litigants treat the first order as though it had been vacated, and try the merits of the claim, this court will, on appeal, disregard any technical question of procedure and treat the appeal as on the merits of the claim presented for allowance.
2. **Subrogation:** BANKS AND BANKING: GUARANTY FUND. One who, pursuant to a contract with a failing state bank, pays the claims of its depositors is not thereby subrogated to the rights of depositors as against the depositors' guaranty fund, notwithstanding that the contract may so provide.

APPEAL from the district court for Phelps county:
WILLIAM A. DILWORTH, JUDGE. *Reversed.*

O. S. Spillman and George W. Ayres, for appellant.

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Stout, Rose, Wells & Martin, Bernard McNeny and G. Norberg, contra.

Stiner & Boslaugh, amici curiæ.

Heard before LETTON, DEAN, DAY and GOOD, Jc.

GOOD, J.

The state of Nebraska has appealed from orders of the district court, allowing a claim for \$187,815.80 against the receiver of the Holdrege State Bank and in favor of the Citizens State Bank of Holdrege, and directing the payment of the claim from the depositors' guaranty fund. For convenience, the Citizens State Bank will hereafter be referred to as the claimant and the Holdrege State Bank simply as the Holdrege bank.

At the outset; it is contended by the claimant that the appeal is from a judgment denying an application to vacate an order or judgment rendered at a previous term of the district court, and that the question of the merits of claimant's right to the allowance of its claim and the payment thereof from the guaranty fund is not before the court. On December 18, 1922, the claim was presented to and allowed by the district court without objection. In February, 1923, the state filed an application to set aside the orders and for permission to make defense to the allowance and payment of the claim from the depositors' guaranty fund. On the 13th of February, 1923, the court entered an order directing that on the 5th of March, 1923, a hearing be had on this application, and directing that the orders entered on December 18, 1922, be suspended until the further action of the court. It may here be observed that the record does not disclose when the term of court, at which the claim was allowed, adjourned, and whether the subsequent proceedings were at the same or at a subsequent term of court. Issues were joined by the state, the claimant and others, as interveners, upon the merits of the claim and a hearing was begun on March 5 and concluded on March 16, 1923. On the hearing there seems to have been some doubt in the minds of the counsel

as to whether the orders entered December 18 had been vacated, and whether the hearing was upon the merits of the claim. Counsel for the state made inquiry of the court and the court made this statement:

"This proceeding will go into the merits of the proposition, just as though it was an application for the order which was first made here. This is in order that all concerned will have a full and complete investigation of the matter. * * * So far as any evidence, except on the merits of the case as to whether there was a claim or whether there was not, that is what is before the court now, and I think we will save time by so considering it in that way. We will go right to the merits of the case, as to whether the order should have been made or whether it should not."

Upon further inquiry by counsel as to whether this was a hearing upon the claim filed by the claimant, and as to whether or not it should be allowed, as if no order had been made, the court answered: "Yes; that is the position of the court." The hearing proceeded and evidence was taken upon the merits, and at the close of the hearing the court rendered a decision upon the merits of the case and entered it as of that date. The claimant now takes the position that the orders of December 18 were never vacated or set aside, and that the question as to the merits of the allowance of the claim is not before the court. It is true that the order entered suspended and did not technically vacate the orders made on December 18, 1922, but it was treated by the court and by counsel for the respective parties as though the first orders had been vacated, and the hearing was upon the merits of the claim. Under these circumstances, this court will disregard any technical question as to procedure and treat the matter as did the trial court and determine it upon its merits.

The question for determination is whether the claimant, having paid the depositors of the Holdrege bank the amount of their deposits, pursuant to an agreement between the two banks, is entitled to be subrogated to the rights of

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the depositors whose claims were paid. There is practically no conflict in the evidence. The record shows that on the 23d day of May, 1921, the Holdrege bank was insolvent, and that its affairs would have been placed in the hands of a receiver unless some satisfactory arrangement had been made for the payment of its depositors. On that date the Holdrege bank entered into a written contract with the claimant, by the terms of which the latter guaranteed and agreed to pay the claims of depositors of the Holdrege bank, amounting in the aggregate to \$338,695.87. The Holdrege bank, as a part of the agreement, transferred to the claimant a part of its bills payable, amounting to \$137,162.40, and also executed a promissory note to the claimant for \$209,150.38, and this note was secured by the pledge of all of its other assets, including the remaining bills receivable, its furniture, fixtures, banking house and other real estate, and all of its assets of every name and nature. The contract provided that the claimant should take over and guarantee the payment of the depositors of the Holdrege bank in the amount due such depositors at the close of business on May 22, 1921, in the amount above stated. The contract further provided:

"Both parties hereto, recognizing that under section 53, article 16, title V, chapter 190, of the Laws of 1919, that the depositors of the Holdrege State Bank have a lien upon all its assets for the payment of such deposits, it is the declared intention of both parties hereto that the Citizens State Bank shall become subrogated to all the rights of deposits taken over and guaranteed, and in consideration of the guaranty and payment by the Citizens State Bank of all the depositors of the Holdrege State Bank in the amount set forth above, the Holdrege State Bank hereby assigns, delivers, and sets over," etc.

The contract contained this further provision: "It is the general purpose of this contract for the Holdrege State Bank to pledge and assign all of its assets of every kind and nature to the Citizens State Bank, to protect the Citizens State Bank in the guaranty of the deposits of the Hol-

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drege State Bank. * * * After the Citizens State Bank shall have collected from the total assets of the Holdrege State Bank an amount equal to the sum of \$359,195.87, being the amount of the deposits and the bills payable, which are assumed by the Citizens State Bank, with interest from May 23, 1921, the excess of such collateral notes and real estate and other assets taken over is to again become the property of the Holdrege State Bank and is to be reassigned or retransferred to them. This contract is subject to the approval of the department of trade and commerce of the state of Nebraska."

Shortly after its execution, the contract was presented to and received the approval of the department of trade and commerce of the state of Nebraska. After the 22d of May, the Holdrege bank did not reopen for business. The claimant paid the depositors of the Holdrege bank, and, at the time of the filing of its claim, claimant had collected a part only of the assets of the Holdrege bank which it had taken as security. The amount so collected, together with the assets which it purchased outright, aggregated \$150,880.07. The excess of the amount paid to depositors by the claimant, over the amount that it had received, was \$187,815.80, and it is for this amount that it seeks to have its claim allowed and paid from the guaranty fund.

Immediately after the execution of the contract by the claimant and the Holdrege bank, it was advertised in the local papers as a merger of the two banks, and it is now urged on behalf of the state that this court should construe the contract as a merger or consolidation of the two banks. Notwithstanding the fact that the banks may have called and advertised it as a merger, the question of whether or not it was a merger must be determined by the terms of the contract. No provision was made for the retirement of the capital stock of the Holdrege bank, nor for the cancellation of its charter. The contract provided for the giving of a note by the Holdrege bank which was to run for a period of six months. It also provided that the surplus remaining after a sufficient amount had been collected to

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reimburse the claimant for the amount it had paid out, pursuant to the contract, should be returned to the Holdrege bank. The contract did not contemplate the extinguishment of the Holdrege bank. It provided and recognized that it should remain as a corporate entity, with liability upon its obligations and with a right to have surrendered to it any surplus of its assets after the payment of its depositors. Under these circumstances, the contract cannot be construed as a merger or consolidation of the two banks. We think the contract should be viewed as one providing for a voluntary liquidation of certain liabilities of the Holdrege bank, including its liabilities to depositors.

If the claimant is entitled to have its claim allowed and paid from the guaranty fund, such right must arise by reason of its being subrogated to the rights of the depositors of the Holdrege bank. We do not understand that claimant contends that what is ordinarily termed legal subrogation is applicable to the situation established by the record, but rather that its contention is that by the doctrine of conventional subrogation it stands in the shoes of the depositors and can assert all the rights that they could assert if they were claimants, and that the application of this doctrine to the situation arises by virtue of the provisions of the contract between it and the Holdrege bank, together with the approval thereof by the department of trade and commerce.

Conventional subrogation arises where one pays the debt of another under an agreement, existing at the time of the payment, with either the debtor or the creditor, that the person paying shall be subrogated to the liens existing as security for the debt. It differs from legal subrogation which exists only in favor of the surety for the payment of the debt, or one who is compelled to pay the debt to protect his own rights. Conventional subrogation arises by reason of either an express or an implied agreement between the third person paying the debt and either the debtor or creditor. *Seeley v. Bacon*, 34 Atl. (N. J.

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Eq.) 139; *Gore v. Brian*, 35 Atl. (N. J. Eq.) 897; *Allen v. Caylor*, 120 Ala. 251, 74 Am. St. Rep. 31; *Home Savings Bank v. Bierstadt*, 168 Ill. 618; 37 Cyc. 367-373; 25 R. C. L. 1325, sec. 11, 1326, sec. 12, 1340, sec. 24. The cases in which the doctrine of conventional subrogation has been applied are numerous, but our attention has not been directed to, nor have we been able to discover, any case where it has been applied in a situation like that existing in this case. It is applicable to cases where the debtor had made an agreement with a third person to pay his debt which was secured by a lien upon his property, or for which his property was pledged, and under such circumstances, if it was so understood or agreed, the person paying would be subrogated to all the rights of the creditor as against the property of the debtor that was in any wise pledged as security; but in the instant case it is sought to have the doctrine applied so as to give the claimant a right against the depositors' guaranty fund. It must be observed, however, that the debtor, with whom the agreement was made, did not own nor have any direct legal interest in or control over the guaranty fund. It had no right or power to pledge it as security for its obligation. The depositors' guaranty fund is created by law for the protection of depositors, and the state is the trustee for the handling and disbursing of the fund. The department of trade and commerce is the state's instrumentality for so managing and disbursing the fund, but the department of trade and commerce has no authority to create any right against that fund and can only pay out the fund upon the conditions prescribed by statute. The approval of the contract by the department of trade and commerce could add nothing to the contract of the parties, so far as creating an obligation against the guaranty fund is concerned. We do not think that the facts and circumstances, as disclosed by the record, create a situation calling for the application of the doctrine of conventional subrogation, except as to assets of the Holdrege bank on which its depositors would have a lien. The claimant was not bound, either legally or morally,

to enter into any contract for the payment of the depositors of the Holdrege bank. It did so voluntarily. For its relief it must look to the party with whom it contracted and the property pledged by the contract.

There is another reason why we think the claimant should not be allowed to recover against the guaranty fund. When the contract is closely analyzed, it does not show there was any intent by the parties to undertake to create any liability against the depositors' guaranty fund. The provision of the contract relied upon is:

"Both parties hereto, recognizing that under section 53, article 16, title V, chapter 190, of the Laws of 1919, that the depositors of the Holdrege State Bank have a lien upon all its assets for the payment of such deposits, it is the declared intention of both parties hereto that the Citizens State Bank shall become subrogated to all the rights of deposits taken over and guaranteed, and in consideration of the guaranty and payment by the Citizens State Bank of all the depositors of the Holdrege State Bank in the amount set forth above, the Holdrege State Bank hereby assigns, delivers, and sets over," etc.

By other provisions of the contract, all of the assets of the Holdrege bank were transferred or pledged for the security of the claimant. The words in the contract, "shall become subrogated to all the rights of deposits taken over and guaranteed," we think clearly contemplate that the rights to which the claimant was to be subrogated were those referred to in the first part of the paragraph, to wit, "a lien upon all its assets for the payment of such deposits," and that nothing which does not come within the description of assets of the bank is included. In no sense can the depositors' guaranty fund be considered an asset of the bank; nor can it be said that the bank holds the provisions of the guaranty fund law as security for its obligations to pay its depositors.

On no theory that we can perceive was the claimant entitled to be subrogated to rights of the depositors as

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against the guaranty fund. It follows that the judgment and order of the district court was erroneous and should be reversed.

REVERSED.

JAMES B. O'CONNOR V. STATE OF NEBRASKA.

FILED OCTOBER 1, 1923. No. 23125.

1. **Criminal Law:** CIRCUMSTANTIAL EVIDENCE. When it is sought to establish the guilt of the accused in a criminal case by circumstantial evidence, it is not sufficient that the facts create a probability, though a strong one. If, therefore, assuming all the facts to be true which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of the accused, the proof fails. It is essential that the circumstances, taken as a whole, and giving them their reasonable and just weight, and no more, should to a moral certainty exclude every other hypothesis.
2. **Forgery:** UTTERING FALSE WILL: BURDEN OF PROOF. In a prosecution for uttering a false will as true and genuine knowing the same to be false, with intent to defraud, and the theory of the prosecution is that the will was recently drawn by the accused or some one in collusion with him and dated back, and the instrument carries upon its face evidence inconsistent with such theory, the burden is upon the state to overcome such evidence by proof beyond a reasonable doubt.

ERROR to the district court for Adams county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed.*

James M. Johnson, F. P. Olmstead, Bernard McNeny and James & Danly, for plaintiff in error.

O. S. Spillman, Attorney General, and W. T. Thompson, contra.

Heard before LETTON, DEAN, ALDRICH, DAY and GOOD, JJ., BUTTON, District Judge.

BUTTON, District Judge.

James B. O'Connor is charged in the information with the offense of uttering a false and forged will. On this charge he was convicted in the district court for Adams

county, and sentenced to the penitentiary. He prosecutes error to this court.

The theory of the state is that this alleged will of John O'Connor was forged, after the death of John O'Connor, by James B. O'Connor or some one implicated with him, and dated back to a time prior to the death, and that the motive was to obtain the fortune left by the deceased. This theory of the state permeates the whole record and constitutes the warp and woof relied upon by the state to hold together and sustain this prosecution and conviction. In the language of the state's brief this theory is expressed as follows:

"The testimony shows that the accused was the first claimant to file a claim of heirship in the county court to John O'Connor. He had taken an active part in the original attempt to probate the will, now involved, in the county court. He was present at all of the many trials involving the estate of the deceased, both in connection with questions of heirship and with those involving wills. He had observed the weak and the strong points in all the proceedings. He was familiar with the local surroundings. He knew what would appeal to the sentiments and feelings, the likes and prejudices of the people of the community respecting any will that might be brought forward, purporting to be the will and testament of John O'Connor. No one was better qualified than he to draft a will that would reflect his eccentric characteristics. Does not the instrument involved attempt to reflect these characteristics and to fit into the local surroundings? No one was more able to make it do so than the accused."

The state has consistently adhered to the above theory at all times and must now stand or fall by this theory, as it has not attempted to establish the alleged forgery of this will at any other time or in any other way.

The will in question was acknowledged before a notary public. Our statute does not require a will to be acknowledged, neither does it forbid it. Hence, a testator

would have the right to have his will acknowledged as an additional means of identification of the instrument. The statute requires but two witnesses to a will, but does not forbid a greater number. If a greater number do witness a will, all are competent to testify. In the same way, the presence of an acknowledgment to a will, the seal and the signature of the notary are all competent to identify the will and must be considered. If a will is unquestioned, the certificate of acknowledgment may be treated as surplusage. However, if genuine, it proves conclusively that the notary was alive at the time he signed the certificate and attached his seal. If he later dies and claim is made that the will was recently drawn and dated back, and the state adopts this theory in a prosecution for forgery, in order to establish the falsity of the will beyond a reasonable doubt, the prosecution must refute the evidence furnished by the work of the notary by proof beyond a reasonable doubt.

We now come to a discussion of the evidence in this case. Watkins, the notary, died August 5, 1909. In the administration of his estate Judge Amick acted as attorney. Within 30 days after the death of Watkins his library and desk and notarial seal were moved to the office of Judge Amick. The seal remained in the possession of Judge Amick until this litigation came up, when search was made for it. Judge Amick found the seal in the right-hand lower drawer of the desk he obtained from Watkins' office about 30 days after Watkins' death. The seal was closed and rusted together and bore evidence of having been in this condition for a long time. The judge was unable to open the seal and took it to a mechanic. The mechanic took out the lever pin and broke the seal apart. An impression of the seal was taken upon a piece of paper and is now in the record. It proved to be the seal of Watkins and the same as the impression upon the will. This identical seal was not used on the will in question recently, as

it was in the possession of Judge Amick and not available to the accused nor any one else. And the seal was unworkable, also, until broken apart by the mechanic at Judge Amick's request.

As to the signature of the notary, Judge Amick says he knew Watkins for 25 years before his death; says he had assisted Watkins many times in the trial of cases; says he knew the way Watkins dressed, how he walked and how he looked, and then says he knew his handwriting as well as he knew his face, and gait, and says the signature to the certificate to the will is the genuine signature of Watkins. And to make his judgment doubly sure, he says he went to the courthouse and found numerous signatures of Watkins, known to be genuine, and made a critical examination of the questioned signature in comparison with the genuine, and again pronounced the signature, to the certificate to the will, the genuine signature of Watkins. Watkins' wife says the signature to the certificate to the will is the genuine signature of her deceased husband. The two witnesses to the will say they saw Watkins sign his name to the certificate. Also Yeager and Brown pronounced the signature genuine. In addition to all this, the record contains numerous signatures of Watkins, admitted by all to be genuine, so that the court may also make a comparison with the signature of Watkins to the certificate to the will, which is also in the record.

Against this testimony we have the opinion of an expert witness. He thought the signature of Watkins to the acknowledgement not only spurious, but also thought it the handwriting of the accused. Another expert, fully as competent, came to the opposite conclusion. The record shows that the first expert testified in another case that the name John O'Connor, signed in Albany, New York, 50 years ago, was the handwriting of John O'Connor who signed certain papers admitted to be the handwriting of John O'Connor of Hastings, Nebraska. After reading his cross-examination, and con-

sidering the entire record, we are of the opinion that the testimony of this witness with the other testimony in the record still leaves more than a reasonable doubt as to the guilt of the accused.

While it was not necessary for the state to show that the accused actually wrote the signature to the will in question, because he was charged with uttering a forged instrument, still it was the theory of the state that the accused did in fact write the signature to the will as well as the signature of the notary. The state attempted to prove this fact to show guilty knowledge on the part of the accused in uttering the instrument. To do this the state called expert witnesses, not only to show that the deceased did not sign the will, but the further fact that the accused did.

The opinion of an expert that a certain signature to an instrument, claimed as spurious, was not written by the same person whose genuine signature he has examined, has probative value. But Mr. Osborn says: "When a signature is shown to be fraudulent, the question naturally arises as to who committed the forgery. This question is usually asked in every such case, but cannot often be answered with much certainty, judging from the writing alone. It is much easier to show that a fraudulent signature is not genuine than it is to show that such a writing is actually the work of a particular writer." Osborn, *Questioned Documents*, p. 13.

The state offered in evidence a letter of the accused to Mrs. Watkins. This letter was dated November 4, 1917. The letter shows a knowledge of the disputed will. The will was not opened and read in the county court until November 19, 1917. This was a damaging circumstance, if true, for it proved guilty knowledge. But, was it true? This letter was dictated to a stenographer. The stenographer was called as a witness. She testified the letter was written at the time of its dictation, and she produced the book containing her original notes. The letters in her note-book before and after

this letter bear consecutive dates before and after November 24, 1917, and there is no indication of tampering with the book or the dates. This book is now a part of the record in this case and bears internal evidence that it is genuine. If the stenographer is to be believed, this evidence is conclusive that this letter was actually written five days after the will was opened, instead of 15 days before.

The witnesses to the will also wrote some letters to District Judge Corcoran. We have examined them and find nothing in the letters to indicate collusion or any corrupt motive. We suppose that, while time lasts, some people will continue to talk and write foolishly. A district judge gets many letters that ought not to have been written. Judge Corcoran did not consider the letters of sufficient importance to answer any of them. No witness was produced to speak against the reputation for truth and veracity of either of these witnesses. Neither witness is an educated man and neither seems capable of carrying out any scheme to defraud.

Now, could this will have been falsely made and these witnesses and Mr. Watkins deceived? It is possible, but highly improbable. The accused could have gotten some one to simulate John O'Connor on October 10, 1908, the date the will bears. But what motive could prompt him? John O'Connor was living at that time. The will of a living man is of no value, and is not even the subject of forgery. *Huckaby v. State*, 45 Tex. Cr. Rep. 577. A later will by O'Connor would revoke such a will without the necessity of proving it spurious. But we need waste no time on conjecture. The state has a different theory, and if the above theory had been adopted the burden would have been on the state to prove it beyond a reasonable doubt, and it finds no support in the evidence.

Was it possible to have produced this will recently and dated it back in some way other than contended for? To do it one would have to take a genuine impression of

Mr. Watkin's seal and have a seal made like it. Then the signature of Mr. Watkins would have to be forged. All this would be almost impossible. But, again, we are not concerned with this theory, as the state adopted a different one. If the above theory had been adopted, again the burden would have been upon the state to establish it beyond a reasonable doubt, and the evidence does not support such a theory.

We will not examine into the state's evidence that John O'Connor was at home, in Hastings, at the time this will was drawn. Suppose this fact were established, it gets us nowhere. The burden would still be upon the state to prove beyond a reasonable doubt that the impression of the notarial seal on the will and the signature of the notary were spurious. The state has not succeeded in doing this. On the other hand, the defense has shown the seal to be genuine almost to a mathematical certainty, and the genuineness of the signature of the notary seems to be established.

It will serve no useful purpose to examine the assignment of errors of law and we shall not do so.

We wish, in passing, to call attention to the case *In re Estate of O'Connor*, 105 Neb. 88. In this case the will herein involved was offered for probate. The evidence in the probate proceedings was the same in many respects as now before the court. In the probate proceedings the state was not a party, and only one question was involved, to wit: Was the instrument offered for probate the last will and testament of John O'Connor deceased? The district court said it was, a majority of the supreme court said it was not. Being a civil case, this question turned on the preponderance of the evidence alone, and did not require proof beyond a reasonable doubt, as it required in such a prosecution as this. Neither the note-book nor the testimony of the stenographer were in evidence at the trial of the civil case, and what then seemed to be a fact—that the letter, dated November 4, was written before the contents of

the will could have been known to the writer, if it was the genuine will of John O'Connor—had great influence on the minds of some of the members of the court in deciding in that case that it was a forgery. That this was an error in the date is now established. The law of the present case is that the defendant is presumed to be innocent of crime until his guilt is established by the evidence beyond a reasonable doubt. We think that in this case this has not been done, even though a preponderance of the evidence in the former case led the majority of the court to the conclusion that the will was forged. The evidence for the state in this case is partly circumstantial in its nature and partly consists of the opinions of witnesses as to the genuineness of the signature to the will. When it is sought to establish the guilt of the accused in a criminal case by circumstantial evidence, it is not sufficient that the facts create a probability, though a strong one. If, therefore, assuming all the facts to be true which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of the accused, the proof fails. It is essential that the circumstances, taken as a whole, and giving them their reasonable and just weight, and no more, should to a moral certainty exclude every other hypothesis.

Under these well-settled principles, we are convinced that the evidence as produced in this, a criminal case, is not sufficient to uphold a conviction.

The judgment of the lower court is

REVERSED.

Good, J., dissenting.

I have no criticism to make of the principle of law announced in the syllabus of this case, but, after a careful examination of the record, I am unable to concur in the view of the majority of the court that the evidence is insufficient to establish defendant's guilt beyond a reasonable doubt.

In my opinion, the evidence establishes the fact that

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the will in question was a forgery, and that the defendant in this case, with knowledge thereof, attempted to procure its probate with intent to defraud, and was therefore guilty of uttering a false will as true and genuine, knowing the same to be false. No error in any ruling of the court or in any instruction is pointed out in the opinion. The reversal is based solely upon the question of fact. The jury, as well as the trial judge, saw the witnesses and their manner of testifying, and were better able to judge of the credibility of the witnesses than is this court. At most, it is a case in which there was some conflict in the evidence. It seems to me that the holding of the court is invading the province of the jury.

NELLIE M. JOHNSON, APPELLANT, v. ALFRED MILLARD
ET AL., APPELLEES.

FILED OCTOBER 20, 1923. No. 22357.

1. **Appeal.** This court will presume that the trial court, in arriving at its judgment, considered only competent testimony.
2. **Deeds: MENTAL CAPACITY.** In an action in equity to set aside conveyances of real estate because of the alleged insanity of the grantor, the question is not whether the grantor's mind was impaired, nor whether he was afflicted with some form of insanity, but whether the powers of his mind had been so affected by his disease as to have rendered him incapable of knowing and appreciating his property and what disposition he wished to make of it at the time he conveyed it.
3. ———: ———. The evidence examined, and *held* that the grantor, at the time of the conveyances in question, had sufficient mentality to know, and did know and appreciate, what disposition he wished to make of his real estate.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.*

Morsman, Maxwell & Haggart, for appellant.

William F. Gurley and Isaac E. Congdon, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and DAY,
JJ., BUTTON and SHEPHERD, District Judges.

PER CURIAM.

This case was submitted to the court upon the printed briefs and without argument at a prior sitting of the court. It was ordered resubmitted and that an oral argument be made. The following opinion was prepared, after the former submission, by Button, district judge. The court being satisfied that it makes a proper disposition of the case adopts it. The opinion follows:

Nellie M. Johnson is the niece of Dr. George L. Miller, deceased. She brings this action to set aside certain conveyances of real estate made by Dr. Miller during his lifetime. The ground is the incompetency and insanity of Dr. Miller at the time of such conveyances.

We are confronted with a voluminous record, a mass of evidence and exhaustive written arguments and briefs, but have not been favored with oral arguments.

A number of the assignments of error have to do with the rules governing the admissibility of evidence; and much of the discussion in the briefs has to do with these rules. The presumption is that the trial court based its decision on competent testimony only. If there is sufficient competent evidence to convince this court after a trial *de novo* that the decision of the trial court is the decision that should be rendered on the facts it will be affirmed.

There is but one question before us, then, as we see it, and this is: Did Dr. Miller have sufficient mental capacity to know and appreciate what disposition he wished to make of his property at the time he conveyed it?

To answer the above question intelligently we must examine the evidence with care. We do not feel justified in quoting from this mass of evidence to any considerable extent, as this opinion will become too voluminous. When the mental capacity of Dr. Miller has been established, or the want of it has been shown, nothing will be accomplished by pursuing this mass of evidence further.

Dr. George L. Miller, an old man, conveyed the parcel of land involved in this action to one Frances M. Briggs on March 11, 1903. Shortly thereafter these parties were married. At the time of this conveyance the First National Bank of Omaha held a mortgage against this land for about all it was worth. On March 6, 1906, Mrs. Frances Briggs Miller with her husband, Dr. Miller, transferred this parcel of land to Charles T. Kountze and Luther L. Kountze, officers of the above bank, in trust. At this time the indebtedness to the bank had not been paid. Later, however, the indebtedness was paid. At the same time another parcel of ground was conveyed, but it is not involved in this action. Dr. Miller also made a will, but it was never probated. Mrs. Miller died before her husband. There seems to be no competent evidence that the doctor was over-reached or defrauded by any of the parties. It seems, therefore, that the question propounded above presents the only problem for solution.

The trust provides in substance as follows:

That the trustees should handle said land and make whatever improvements were necessary to cause it to yield an income, to collect the income and pay the mortgage, and also pay to Miller and his wife what was necessary for their support and care, and upon the death of Miller and wife to convey the property to Alfred Millard, Charles T. Kountze, and Luther L. Kountze with the income and accumulations in trust and to be conveyed by them, as soon as practicable, to some society or corporation having its principal place of business and field of operations in the city of Omaha, and having for its object the prevention of cruelty to animals or the care of and prevention of cruelties to children and animals, and if there should be no such society in existence, the said trustees should cause one to be organized for the purpose. This property was to be conveyed to such society for the purpose of pro-

ducing an income to be used as above and to be known as "The George L. Miller Memorial."

The conveyance from Miller to Miss Briggs and the conveyance to the above trustees by Mrs. Miller and husband are the conveyances claimed to have been void because Miller was insane at the time. There is no claim that Mrs. Miller was insane.

We will first examine the evidence tending to establish sanity, immediately before, at the time of the conveyance, and during the time intervening between March 11, 1903, and March 6, 1906, and afterwards.

Dr. Miller owned 480 acres of land which he platted into "Seymour Park." On this land he erected a home for himself and family. On this land was sunk an artesian well. From this well there developed Seymour Lake. This lake became valuable for harvesting ice. This situation was brought about by the industry and business sagacity of Dr. Miller, and from this time on for some time we find him making leases with reference to the sale and purchase of ice, bargaining with the Cudahy Packing Company, dealing with the banks, and others, and doing his own business in a seemingly intelligent and sane manner. During the latter part of 1893, Dr. Miller, in common with many others, suffered financial reverses and was compelled to mortgage his land. In the course of time this property, from the income from the ice and otherwise, began to pay about its own redemption from the mortgages. There was a justification for Dr. Miller's business sagacity and foresight. From 1902 to 1909 Dr. Miller transacted a great deal of business. In 1903 he married. In 1906 he entered into the agreement heretofore mentioned. And for many years he dealt in various ways with many people. In September, 1900, Dr. Miller suffered a mental collapse. From this sickness he recovered so that during the years up to 1909 he transacted his business as above stated. It becomes material to know what some of the people with whom he dealt thought of Dr. Miller's

sanity during the years 1903 to 1906, inclusive, the period involved herein.

John H. Bexton states that from 1901 to 1908 Dr. Miller dealt with the bank of which Bexton was cashier continually. Bexton heard his conversations and knew of his business transactions, and Bexton says he was sane during this period. Charles Kountze, also of the bank, says the same thing; as does Davis, president of the bank. Mann, secretary of the Forest Lawn Cemetery Association, says Dr. Miller was sane during this period. James B. Haynes, C. C. Shriver, Richard L. Metcalf, Harry A. Tucker, Robert W. Patrick, and Abraham L. Reed, all substantial business men of Omaha, all testified to Dr. Miller's sanity during the period of concern in this action. Surely here is sufficient evidence to indicate Dr. Miller's sanity during the time involved herein.

Dr. George L. Miller was adjudged insane in 1900. All the doctors testifying seem to think Dr. Miller was insane in 1900 and that he was suffering from paranoia. There was insanity in the family. His letters indicate an abnormal mentality. Paranoia may be defined as mental unsoundness of a chronic character. It is progressive in character. In the early stages of this disease, and before it has progressed to so aggravated a form, a patient is much better at times than at other times. In other words, the patient has lucid intervals when he is capable of transacting business. We search the record in vain for any witness who had business transactions with Dr. Miller in the years 1903 to 1906 who noticed he was not competent to transact his business. If, then, we accept the conclusions of the doctors as final, still the appellees have shown that Miller was capable of transacting his business at the dates of the two conveyances in question.

Mere inbecility or weakness of mind, however great, is not insanity. There must be a total want of understanding. *Mulloy v. Ingalls*, 4 Neb. 115; *Johnson v.*

Phifer, 6 Neb. 401; *Witte v. Gilbert*, 10 Neb. 539; *Dewey v. Allgire*, 37 Neb. 6.

The question in all cases is not whether a person's mind is impaired, nor whether he is afflicted by any form of insanity, but whether the powers of his mind have been so affected by his disease as to render him incapable of transacting business like the business in question at the time of the transaction. *Martin v. Harsh*, 231 Ill. 384, 13 L. R. A. n. s. 1000; 1 Parsons, Contracts (9th ed.) p. *383, and note; *Sands v. Potter*, 165 Ill. 397; *Elwood v. O'Brien*, 105 Ia. 239; *Milks v. Milks*, 129 Mich. 164; *Whitaker v. Hamilton*, 126 N. Car. 465; *Buckey v. Buckey*, 38 W. Va. 168; *Carnegie v. Diven*, 31 Or. 366; *McIlroy v. Rivercomb*, 142 Ark. 354; *Williams v. Reese*, 177 Ky. 679.

Conceding all the doctors say, Dr. Miller was suffering from paranoia or mental unsoundness with delusions. This alone would not render his conveyance void. That paranoia is "monomania" is held in *People v. Braun*, 158 N. Y. 558, and *Flanagan v. State*, 103 Ga. 619. A conveyance is valid, then, if the delusion exists only with reference to an extraneous matter, so that it cannot be reasonably supposed to have influenced the grantor in making the conveyances. *Teegarden v. Lewis*, 145 Ind. 98; *Lewis v. Arbuckle*, 85 Ia. 335; *West v. Russell*, 48 Mich. 74.

However, conceding that Dr. Miller was suffering from paranoia, appellees contend he had a lucid interval which covered, at least, the years 1903 to 1906, inclusive. The burden was upon the appellees to prove this. *Gingrich v. Rogers*, 69 Neb. 527.

The appellees have sustained this burden. The business friends and associates of Dr. Miller, without a dissenting voice, have said that they noticed nothing wrong with his mentality during those years and that he fully understood his business transactions. There is no witness who knew him during those years, who dealt with him or associated with him, who speaks to the contrary. The

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man who had acquired this property, planned to make it yield an income, and succeeded, and whom business associates, without exception, pronounced sane, had sufficient mental capacity to know and appreciate what disposition he wished to make of his property. The conveyances involved were valid.

The judgment of the lower court is right, and is
AFFIRMED.

WILLIAM H. PARSONS, APPELLEE, v. CHICAGO & NORTH-
WESTERN RAILWAY COMPANY, APPELLANT.

FILED OCTOBER 20, 1923. No. 22425.

1. **Master and Servant:** ASSUMPTION OF RISK. An employee, by entering and continuing in the employment of a railroad company, under the federal employers' liability act, assumes the ordinary risks and dangers incident to the employment, and the extraordinary risks and dangers which are obvious or of which he is aware, but he does not assume extraordinary risks which are unknown to him or which are not so obvious that a man of ordinary intelligence would have appreciated them.
2. **Trial:** INSTRUCTIONS. "Whether the instructions could have produced misconception in the minds of the jury is not to be ascertained by merely considering isolated statements, but by taking into view all the instructions given, and the tendencies of the proof in the case to which they could possibly be applied." *Seaboard Air Line Ry. v. Padgett*, 236 U. S. 668.
3. **Master and Servant:** NEGLIGENCE: ASSUMPTION OF RISK: QUESTIONS FOR JURY. Evidence examined, and held sufficient to submit to the jury the question of negligence on the part of the defendant in the providing of an insufficient appliance with which to move a car in a railroad switch-yard, and the issue of assumption of risk on the part of the plaintiff.

APPEAL from the district court for Dawes county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Wymer Dressler, Robert D. Neely and Paul S. Topping,
for appellant.

M. F. Harrington, Earl McDowell and Gerald F. Harrington, *contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN

and GOOD, JJ., REDICK and SHEPHERD, District Judges.

PER CURIAM.

Action brought by plaintiff under the federal employers' liability act to recover damages for personal injuries alleged to have been sustained by him by reason of the defendant's negligence. The trial resulted in a verdict and judgment in favor of the plaintiff for \$5,000. The defendant appeals.

The material facts relating to the accident are as follows: On January 22, 1921, the plaintiff was, and for four years prior thereto had been, in the employ of the defendant railroad company as a switchman in the defendant's yards at Casper, Wyoming. He was what is termed by railroad men an "engine foreman." Generally speaking his duties required him to follow the engines and give directions to the members of the switching crew with respect to switching cars in the yards. He described his duties as "Just picking up cars and placing them where they belonged in the yards at Casper." As between himself and the other members of the switching crew he was foreman. On the morning of January 22, 1921, the plaintiff and other members of his switching crew were engaged in switching cars. One of the movements which they desired to make was to switch a car loaded with steel from the main lead-track onto a side-track, and "spot" it at a proper place. At the time in question the engine was headed west and had attached to it on the west three cars, the car loaded with steel, before mentioned, being on the extreme west end of the string of cars. In making this switch the men in charge moved the engine and cars toward the east on the main lead-track, and while the cars were still in motion the most westerly car was cut off, the speed of the engine accelerated, and after the engine and two cars had passed the switch the rear car, while in motion, was switched onto the side-track. It was intended that the momentum of the car cut off would be sufficient to carry it onto the switch-track, and in the clear of cars moving on the

main lead-track. The speed of the car, however, did not carry it far enough to clear the main lead-track. To overcome this situation the men in charge undertook to move the car loaded with steel by a process known among switching crews as "poling" the cars. This is usually done by wedging a stout pole or heavy timber between a car on the side-track and a car or the engine on the lead-track in such a manner that by moving the engine forward the pole will push or shove the car on the side-track forward. The testimony shows that this process is not an unusual one in moving cars in railroad yards. The testimony shows that the defendant at its yards at Chadron and Fremont, Nebraska, provides a stout pole made of oak, about 12 feet long and 5 or 6 inches in diameter, which is carried on the switch engine, and which is intended to be used in "poling" cars. No such appliance was provided at the Casper yards. The testimony shows that the men at Casper usually used, in place of a regular pole, a railroad tie or heavy timber for "poling" cars. When the car failed to clear the main lead-track, the plaintiff and his helpers immediately began search for some appliance suitable to pole the car in the clear. In the search the plaintiff picked up a piece of gas-pipe, about 5 or 6 feet long and 2 inches in diameter, but discarded it because, in his judgment, it was not suitable for the purpose. It so happened that a Mr. Collier, a yard foreman, who was the superior of all the members of the switching crew, was present and joined in the search. He picked up the gas-pipe, which the plaintiff had discarded a moment before, and handing it to Mr. Carson, a member of the crew, said: "Come on, let's get this car in the clear." Collier and Carson then signaled the engineer to back the train down so as to bring the rear car of the train alongside of the car on the switch-track. Collier and Carson then proceeded to place the gas-pipe in such a position that one end would rest against the car on the switch-track and the other against the car on the main lead-track. At this

time plaintiff appeared and took a position between the two cars, about 15 or 20 feet from the gas-pipe, and joined in signaling the engineer to move the cars forward. When the signal was given Carson ran forward past the plaintiff, as he figured that the gas-pipe might rebound when the pressure was removed by the movement of the cars. When the car on the side-track moved, the gas-pipe was hurled forward through the air, end over-end, with great force, striking the plaintiff on the left foot, producing the injuries complained of.

The plaintiff's cause of action is grounded upon the theory of the defendant's negligence in failing to exercise ordinary care in providing the proper instrumentalities for moving the car, and the use by his superior of a light and insufficient gas-pipe.

It is first urged by the defendant that the court erred in refusing to direct a verdict for the defendant. In support of this contention, defendant argues, first, that the evidence is not sufficient to show any negligence on defendant's part; and, second, that the injury sustained by the plaintiff was a risk assumed by him by virtue of his employment.

It is conceded by both sides that the action is brought under the federal employers' liability act, and that the plaintiff's rights, if any, are to be determined in the light of the provisions of that act.

In so far as it is material here, that act provides, in substance, that common carriers engaged in interstate commerce shall be liable for the injury to an employee resulting in whole or in part from the negligence of any officer, agent, or employee of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, or other equipment.

As before pointed out, the testimony is clear that the gas-pipe used in poling the car was selected by Collier, the yard foreman, and it would seem that it was in-

sufficient, unfit, and improper for the purpose for which it was used.

Defendant argues upon this point that, inasmuch as the plaintiff was the switch foreman, the selection and use of the gas-pipe must be regarded as his act. In this contention we think the defendant has overlooked one very important item of evidence, which is undisputed. While it is true the plaintiff was the foreman of the switching crew, it is also true that at the time of the accident Collier, the yard foreman, was present. He was the superior of all the switching crew, including the plaintiff. In the situation thus presented, Collier assumed to take charge of the work. He gave the command to the men to come and get the car in the clear. He selected the gas-pipe as an instrument to be used in poling the car, helped to put it in position, and, but for the sudden appearance of the plaintiff, would have had the work completed without plaintiff's knowledge or participation. As we view the record, it seems clear that the action of Collier must be regarded as the act of the defendant.

Under the facts and circumstances disclosed by the record, we are of the view that the question of whether ordinary care was used by the defendant in selecting an instrument reasonably safe for the work then being done was a question of fact for the jury.

It is next urged that the doctrine of assumption of risk precludes the plaintiff's right to recover. The rule is well-settled, not only in this state, but elsewhere. An employee, by entering and continuing in the employment of a railroad company, under the federal employers' liability act assumes the ordinary risks and dangers incident to the employment, and the extraordinary risks and dangers which are obvious of which he is aware, but he does not assume extraordinary risks which are unknown to him or which are not so obvious that a man of ordinary intelligence would have appreciated them. Numerous cases are readily to be found supporting this doctrine. A few

are here noted: *Fitzpatrick v. Hines*, 105 Neb. 134; *Bower v. Chicago & N. W. R. Co.*, 96 Neb. 419, subsequently affirmed in *Chicago & N. W. R. Co. v. Bower*, 241 U. S. 470; *Chicago, B. & Q. R. Co. v. Shalstrom*, 195 Fed. 725, and cases cited, with note in 45 L. R. A. n. s. 387; *Chicago, R. I. & P. R. Co. v. Ward*, 252 U. S. 18; *Chesapeake & O. R. Co. v. De Atley*, 241 U. S. 310; *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492.

Under the facts disclosed by the record, we think the trial court was right in submitting to the jury the question of assumption of risk.

Complaint is made of a number of instructions given by the court, among them instruction No. 8. The only complaint made of this instruction is that it erroneously states that the law required defendant to furnish the employees a reasonably safe place to work, because negligence in this respect is not shown by the evidence, and that it erred in submitting a question as to the strength of the gas-pipe. There is some merit in the criticism directed to the first point. The master had used due care to provide a safe place in so far as the condition of the surface of the ground between the tracks was concerned, at least as safe a place as could be furnished in such a yard where tracks interlaced and engines and trains were apt to be running at any time. The place might in one sense be said to be unsafe at the time the plaintiff was injured, on account of the flying missile, but in a proper sense the place was safe. We must presume that the jury took all the evidence into consideration, that they were possessed of ordinary perception and apprehension, and that their verdict was not based upon a theory that the railroad yard was any less safe than such yards usually are. The fact that this isolated expression was used, not applicable to the evidence, should not operate to set aside the verdict, unless we are satisfied that it was prejudicial to defendant.

Another point may be mentioned, although not called

to the attention of this court or apparently to the attention of the trial court. The supreme court of the United States has said that under the federal employers' liability act it is the duty of an interstate carrier to exercise "reasonable care" (*Seaboard Air Line Ry. v. Horton*, 233 U. S. 492), "due diligence" "due care" (*Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64), "reasonable diligence" (*Myers v. Pittsburgh Coal Co.*, 233 U. S. 184), to see that the appliances furnished its employees are not defective or insufficient to perform the work required of them, and that it is only for negligence in that regard that such a carrier is liable.

The instruction is inaccurate in the expression used as to this duty. Separated from its context, the portion of instruction No. 8 referred to is inaccurate, but when it is considered that the real complaint of plaintiff is that defendant was negligent in failing to use reasonable care in the selection of the appliance with which to move the car, and that it did in fact negligently supply an insufficient and defective instrumentality, and that this was the real issue on which the case turned, it seems to us that the instruction, taken as a whole and in connection with the entire charge of the court and the evidence in the case, could not have misled the jury. Its main purpose was to submit to the jury the question "whether the use of this gas-pipe was a negligent and wrongful act on the part of the defendant company. On that you will consider all the evidence, the strength of the gas-pipe, the custom of this and other roads as to what should be used in poling or frogging a car, and every fact which shows what would be reasonably necessary to be used as a pole under such circumstances, and every fact and circumstance in evidence, and from all this evidence decide for yourselves whether the defendant was negligent in the use of this gas-pipe, and whether this negligence caused the injury to the plaintiff. If you shall find that it did so cause the injury to him, then your verdict should be for the plaintiff, unless the de-

fense of assumed risk is made out here, and on that question the burden of proof is upon the defendant."

It was said in *Seaboard Air Line Ry. v. Padgett*, 236 U. S. 668: "Whether the instructions could have produced misconception in the minds of the jury is not to be ascertained by merely considering isolated statements, but by taking into view all the instructions given, and the tendencies of the proof in the case to which they could possibly be applied." To the same effect is *South-ern R. Co. v. Bennett*, 233 U. S. 80, in which case, as here, this defect was not called to the attention of the court.

In *Parker v. Omaha Packing Co.*, 85 Neb. 515, in which a like statement as to the duty of a master was made, it was said: "A case will not be reversed on account of the use of this expression unless, under the peculiar circumstances of the case, a jury would be apt to be misled thereby as to the amount of care demanded on the part of the master in supplying tools." This court has departed from the view that trifling errors, such as may occur in any human undertaking or investigation, and which clearly do not impede or interfere with the due administration of justice, must necessarily result in a new trial.

It is complained that the verdict is excessive. There is a conflict in the testimony of several medical witnesses who were called. If the evidence of plaintiff and his doctor was believed by the jury, the pain was excessive and the injury permanent. If such is the fact, the amount of the verdict is ample, but not excessive. If the other witnesses as to the extent of his injuries are credited, the recovery, which was for \$5,000, should be reduced. In any event the excess would not justify the court in setting the verdict aside, on account of it being the result of passion and prejudice. We do not feel justified in disturbing the finding of the jury in this regard. We have considered the other errors as-

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signed, but deem none of them justifies a reversal.

AFFIRMED.

FRED E. BODIE, RECEIVER, APPELLANT, v. T. H. POLLOCK,
APPELLEE.

FILED OCTOBER 20, 1923. No. 23299.

1. **Banks and Banking:** LIABILITY OF STOCKHOLDERS: CONSTITUTIONAL PROVISION. Sections 4 and 7, art. XII of the Constitution, are self-executing when considered together, as they have been and should be; and, so considered, they form a complete constitutional rule to the effect that, while stockholders in banks are subject to the double liability set out in said sections, such liability cannot be enforced until the property of the bank has been exhausted, and the amount justly due judicially determined.
2. ———: ———: ———: POWER OF LEGISLATURE. Since the time when the liability of a bank stockholder can be enforced is definitely fixed by the Constitution, no other time for the enforcement of that liability can be prescribed by the legislature so long as the Constitution stands unchanged.

APPEAL from the district court for Cass county:
JAMES T. BEGLEY, JUDGE. *Affirmed.*

Gaines, Van Orsdel & Gaines, for appellant.

Crossman, Munger & Barton, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN, DAY and
GOOD, JJ., REDICK and SHEPHERD, District Judges.

PER CURIAM.

Plaintiff was receiver of the Bank of Cass County, which was insolvent. Before the assets of the bank were exhausted and without any judicial determination that said assets were insufficient to pay the creditors, he brought an action against the defendant Pollock, a stockholder, for a sum equal to the face value of the latter's stock, alleging in his petition that it was necessary to enforce the double liability of the stockholders in order to pay out. The defendant demurred to the petition upon the ground that it did not state facts sufficient to constitute a cause of action, and because it showed on

its face that the action was prematurely brought. The demurrer was sustained and plaintiff brings the case here for review.

It is conceded in the briefs and upon argument that the petition was sufficient except that it was not alleged therein that the bank assets had been exhausted and that the proper judicial determination as to the amount due had been made. The question is, therefore, may a receiver bring his action against the stockholders when the bank is adjudged insolvent, as the appellant receiver contends, or must he wait until the assets are exhausted and a judicial determination has been made of the exact amount justly due, as the trial court found?

The law of double liability is found in section 7, art. XII of the Constitution, and is as follows:

"Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder."

It is the contention of the appellant that this provision is not self-executing and must be construed in connection with the legislative enactment of 1919 to give it effect. The following is the legislative enactment in question, found in section 8015, Comp. St. 1922:

"Every stockholder in a banking corporation shall be individually liable to its creditors, over and above the amount of stock by him held, to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder. In case any stockholder shall sell, transfer or dispose of such stock, knowing that such bank is insolvent, he shall be deemed the owner of such stock, and liable thereon the same as if such stock had not been sold, transferred or disposed of; and such liability may be enforced whenever such banking corporation shall be adjudged insolvent without regard to the probability of the assets of such

insolvent bank being sufficient to pay all of its liabilities."

But, though the doctrine so contended for—that the constitutional provision is not self-executing—is supported in a way by much respectable authority, this court has held to the contrary. In a case involving the liability of a stockholder in a banking corporation, it was expressly declared that the provisions of said section 7 of the Constitution are enforceable without supplementary statutory enactments. *Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353. It is true that the provision standing alone may lack the completeness necessary to make it self-operating. This is the point upon which a number of courts have held somewhat similar constitutional provisions inoperative of themselves. But construing the section with another section of the Constitution, section 4 of the same article, any lack of this kind is supplied and the section becomes of itself fully operative in so far as to provide for the enforcement of the double liability referred to therein. The language of said section 4 is:

"In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock."

By this it will be seen that the time and conditions of the enforcement of the liability are made sufficiently definite.

Prior to 1897 the legislature passed a law (Laws 1895, ch. 8, sec. 35) expressly providing that, whenever any bank receiver should report to the court that in his opinion the assets of the bank would not be sufficient to pay out within a reasonable time, the court might direct him to at once collect from the stockholders. Proceeding under this statute, the receiver of the German

Savings Bank made such a report to the court and prayed the court for an order permitting and directing him to sue the stockholders on their double liability. The stockholders, or one of them, intervened and opposed the application. Their objections were overruled, and the order made. This order was reviewed upon the merits in this court in the case of *State v. German Savings Bank*, 50 Neb. 734, and the doctrine announced by the court in that case has become the settled law of the state through a long course of years and by a line of cases in which said doctrine has been consistently upheld. The case referred to was considered with unusual care because of the legislative enactment referred to, which, it will be observed, is similar in language and purpose to the enactment of 1919 hereinbefore quoted. In other words, the legislature in that case, as in this, had attempted to supplement the Constitution by providing that the stockholders might be sued before the assets were exhausted. The opinion in that case completely answers the contention of the appellant receiver in this. And the reasons for sustaining the objections of the stockholders in that case apply with equal force to sustaining the decision of the district court in this. It was there again announced that the two constitutional provisions, sections 4 and 7, art. XII, were to be construed together, and that, so construed, they were completely self-operating and self-executing, to the effect that the double liability existed, but that it could not be enforced until the assets were exhausted and until the court judicially determined the exact amount to be recovered. It was there declared that no matter of expediency or of policy ought to be permitted to avoid or to change the express provision and direction of the fundamental law, and that the legislature could not be permitted to provide by legislative enactment a different or a better rule for enforcing the liability against the stockholder, even if experience seemed to show that it would be beneficial. To be sure, the Constitution

could be changed, but in this connection what the recent constitutional convention did affords only an additional reason why the rule so long ago announced and so uniformly adhered to should now stand. Not only did the late constitutional convention not change the constitutional provisions in question, but it reenacted them. These constitutional provisions had received a construction which had become the settled law of the state and that construction had been read into and become a part of the said provisions. It is well settled in many, if not most, of the jurisdictions of the country that, where a construction of constitutional provisions has been adopted and a constitutional convention thereafter reenacts such provisions, it reenacts not only the language of the provisions but the construction which has attached to the same.

Probably no better exposition and declaration of the law with respect to the question now before the court can be found than appears in the opinion written in the case of the *State v. German Savings Bank, supra*. In the interest of clear and comprehensive statement excerpts from that opinion are here quoted:

“It will be observed at once that the general effect of these two provisions is to establish a liability, free from interference by the legislature, on stockholders of all corporations, subject to certain conditions, for their unpaid subscriptions; and in the case of banking corporations, an additional liability for a further amount equal to the amount of stock held by any person for the purpose of paying debts incurred while such person is a stockholder. The conditions attached to the enforcement of the first liability are that its enforcement must be in cases of claims against corporations; that the amount of such claims shall be first ascertained, and that the corporate property shall have been exhausted.

“Does the banking act, in so far as it attempts to confer authority upon the court to authorize the receiver of a bank, merely upon a report that in his opinion

the assets of the bank are insufficient to pay its liabilities within a reasonable time, to collect this unpaid subscription, conflict with section 4 as we have quoted it? * * * A large portion of the argument in support of the statute has been addressed to three points: In the first place, a consideration of the policy of the statute, which is manifestly to afford a speedy and somewhat summary remedy for creditors of insolvent banks, and to enable the receiver, for their benefit, to promptly enforce all liabilities of stockholders. Secondly, the justness of this policy, the danger attending upon any process requiring securities to be immediately sold, often on a falling market and at a sacrifice, or, if that danger be avoided, the still greater danger of delaying resort to proceedings against stockholders until such a time that by their death or insolvency the remedies become ineffectual. Thirdly, an appeal to the general principle that the corporation, while it was a going concern, had the right to make calls for unpaid subscriptions regardless of the sufficiency of its assets to pay existing liabilities, and that this right passed to the receiver, so that the receiver, in collecting unpaid subscriptions, is acting merely as he does in collecting other assets. We freely grant the correctness of the last statement as the statement of a general principle of law, and we further concede the correctness of the contention of the appellee as to the policy of the statute. We may further, for the purposes of this case, acquiesce in the position of counsel that for the effective winding up of insolvent banks and the protection of depositors a remedy against stockholders should be permitted in some cases, before, by a slow process of liquidation, other assets shall have been exhausted. But all these are matters not particularly pertinent to the question under consideration. We are not free to declare the law as we believe it ought to be. In a doubtful case of construction it may be proper to throw the balance in favor of that side where we conceive the natural justice and policy to

lie; but this only for the reason that in such doubtful cases it is rather to be presumed that the intention of the lawmakers was on the side of manifest justice and policy. Where, after resort to established canons of construction, no doubt is left, we must construe the law as written, and not in accordance merely with our own notions of abstract or substantial justice. Furthermore, in interpreting the written law the prevailing doctrine of other jurisdictions is of assistance only for the purpose of ascertaining upon what information the lawmakers acted in adopting their language, and such general doctrine cannot be permitted to prevail as against a written Constitution or statute plainly implying an intention to change the rule. * * * The Constitution must be interpreted according to the facts which its framers and the people in adopting it had then in mind. * * * We are entirely clear that the general purpose of the constitutional provision was as already indicated, and that it was the deliberate intention of the framers of the Constitution to render the liability for unpaid stock subscriptions, in one sense at least, secondary, to be enforced only after a consummation of the conditions precedent mentioned, and it is no answer to this conclusion to assert that the corporation itself, while it was a going concern, might by call, if necessary, followed by suit, have enforced that liability as primary. The conditions are different. The corporation in making calls acts for the stockholders. Directors or other officers authorized to make the call are representatives of the stockholders, by them selected for that and other purposes, and the object in making the call is to provide the corporation with means of proceeding with the business for which it was created. When, however, the corporation suspends its functions as a going concern, the only purpose of resorting to the capital is to discharge debts. It was perfectly competent for the Constitution to provide that upon this contingency a liability which might theretofore have been enforced

unconditionally by the representatives of the corporation should thereafter be enforced only as a secondary liability and so far as necessary to accomplish its purpose. This the Constitution did, and in such clear terms as to be almost unmistakable. * * * The new feature was affixing terms and conditions upon which, and upon which only, the liability could be enforced, and it was beyond the power of the legislature to provide a remedy whereby such liability could be enforced in violation of the terms impressed by the Constitution.

"We conclude that the portion of the banking act under which the order complained of was made is in conflict with section 4 of article XII of the Constitution relating to miscellaneous corporations, and is void. The report of the receiver showing affirmatively that the corporate property had not been exhausted, but only that it was in his opinion probably insufficient within a reasonable time to pay the liabilities of the bank, the court had no authority at that time to direct actions to be brought for the unpaid subscriptions."

Following this decision are *Hastings v. Barnd*, 55 Neb. 93; *State v. German Savings Bank*, 65 Neb. 416; *Hamilton Nat. Bank v. American Loan & Trust Co.*, 66 Neb. 67; *Holcomb v. Tierney*, 79 Neb. 660. Nor does the holding so announced lack approval in federal jurisdictions. In *Goss v. Carter*, 156 Fed. 746, the circuit court of appeals for the fifth district declare that the provisions in question are self-executing, and state in substance that by the mandate of the Nebraska Constitution the liability of bank stockholders cannot be imposed till the indebtedness of the corporation is judicially ascertained and the assets of the corporation exhausted.

The law being as it is, the ruling of the district judge was right, and should stand. For, "while a practical interpretation of the Constitution by the legislature will not be lightly disregarded in doubtful cases, yet, when the language of the Constitution is free from ambiguity, an interpretation thereof by the legislative department

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cannot be invoked to nullify the fundamental law." *State v. Cornell*, 60 Neb. 276.

AFFIRMED.

QUEEN INCUBATOR COMPANY, APPELLEE, v. CHARLES E. BYERS ET AL., APPELLANTS.

FILED OCTOBER 20, 1923. No. 22512.

Appeal: REQUESTED INSTRUCTION. When a defendant submits an instruction covering his theory of the case to the trial court, which is adopted by the court and given to the jury, and the jury returns a verdict for the plaintiff, the verdict will be upheld if there is sufficient competent evidence in the record to sustain it. *Held*, that the evidence sustains the verdict.

APPEAL from the district court for Adams county: WILLIAM A. DILWORTH, JUDGE. *Affirmed*.

James & Danly, for appellants.

Bruckman & Paulson, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN, DAY and GOOD, JJ., REDICK and SHEPHERD, District Judges.

MORRISSEY, C. J. .

This is an action brought by plaintiff against defendants to collect a balance due for merchandise sold and delivered by plaintiff to defendant; the amount originally due was \$2,197.52. Of this sum defendants have paid \$1,867.90. Plaintiff was the manufacturer of incubators and accessories, and defendants were dealers in lumber and commodities generally carried in that line of trade. The receipt of the merchandise is not denied, nor is any complaint made of the amount at which it was billed by plaintiff, but the answer alleges that, under the agreement between plaintiff and defendants, plaintiff obligated itself not to sell at retail incubators in the territory adjacent to defendants' lumber yards, and that plaintiff violated this agreement. And because of this alleged violation of the agreement, defendants refused to pay the full amount demanded by plaintiff, but did send to plaintiff a check in the sum of \$1,867.90, to-

gether with a statement that said sum must be accepted as full payment of the amount due or the check returned. It is also alleged that plaintiff accepted the check, collected in cash the face thereof, and that by reason thereof plaintiff is estopped from demanding any additional sum. The cause was tried to a jury and at the conclusion of the evidence defendants requested, and the court gave, the following instruction:

"Under the pleadings and the evidence in this case there is but one issue to determine, and that is in regard to the tender and acceptance of the check in dispute.

"Hence, you are instructed, gentlemen of the jury, that under the laws of the state of Nebraska, where there is a *bona fide* dispute between the parties, plaintiff and defendant, as to the amount due on an account, and the debtor tenders to the creditor a less amount than due, in full settlement of the debt, and the creditor, knowing that the same is tendered in full settlement, accepts the same, the same is a settlement in full of said debt. If you find from the evidence that the defendants in this action tendered to the plaintiff a sum less than claimed by plaintiff, and tendered the same in full settlement of the account, and that the plaintiff knew that the same was tendered in full settlement of the account, and accepted the same, then and in that case it would be your duty to find in favor of the defendants and against the plaintiff; provided, however, that you find that there was a *bona fide* controversy existing between the parties as to the amount due at the time said check was accepted. On the other hand, if you find that no *bona fide* controversy between the parties existed at the time said check was accepted by plaintiff, then you should find for the plaintiff."

The jury returned a verdict for plaintiff, on which the court entered judgment, and defendants appeal.

It is alleged that the verdict is not sustained by the evidence, and is contrary to law and to the instruction given. Defendants having requested the instruction,

it will be assumed that it properly submits their theory of the case. There is a suggestion in the brief of appellee that the request for the instruction given constitutes an admission, in the absence of a request for a peremptory instruction, that there was sufficient evidence in the record to warrant the submission of the case to the jury. However, we think this point may be passed without discussion, for when we turn to the evidence furnished by the defendants we fail to find anything to support the contention that there was a *bona fide* dispute between the parties as to the amount due. One of the defendants admitted, upon the witness-stand, that the amount covered by the invoice was never in dispute, and that when the collector for a bank presented the bill he declined to pay, but said that defendants would pay "when they got ready," and in response to the direct question as to whether plaintiff had agreed to accept less than the full amount said, "I don't know that they ever did." It also appears that on receipt of the check plaintiff wired defendants that the check was received and would be applied on the account, and that defendants should pay the balance due within 48 hours. This gave defendants ample notice of the conditions on which the check was accepted and they might have stopped payment on the check had they so desired. On consideration of all the evidence, the jury might have found that there never was a *bona fide* dispute as to the amount due, or that there had never been an accord and satisfaction.

As the cause was submitted to the jury on defendants' theory of the law, and the evidence is amply sufficient to sustain the verdict, the judgment is

AFFIRMED.

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CHARLES D. TRAPHAGEN, APPELLEE, v. LINCOLN TRACTION COMPANY, APPELLANT.

FILED OCTOBER 20, 1923. No. 22516.

1. **Negligence.** Under the circumstances of this case as shown by the evidence, whether the failure of plaintiff to look and listen before undertaking to pass in front of the street car constituted such negligence as would defeat plaintiff's recovery was a question of fact.
2. **Appeal: DIRECTED VERDICT.** "In determining whether a peremptory instruction was justified, the party against whom the verdict is directed is entitled to have every controverted question of fact resolved in his favor, and to have the benefit of every inference that reasonably can be deduced from the facts in evidence." *Schmelzel v. Lecky*, 104 Neb. 672.
3. **Negligence: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY.** Where it is established, in an action to recover damages suffered by plaintiff as a result of a collision between his automobile and one of defendant's street cars, that plaintiff, having his attention attracted by the violent sounding of the gong on a street car approaching a street intersection from the east, without looking to the west to observe if a car might be approaching from that direction, drove his car upon defendant's tracks, where it was struck by an east-bound street car which was then operated at the rate of 20 to 22 miles an hour without sounding a gong or giving any warning of its approach, it is proper for the court to submit the questions of negligence and of contributory negligence to the jury under our comparative negligence statute (Comp. St. 1922, sec. 8834).

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. Affirmed.

Field, Ricketts & Ricketts, for appellant.

Peterson & Devoe, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN, DAY and GOOD, JJ., REDICK, District Judge.

MORRISSEY, C. J.

This action was brought by plaintiff to recover for damages sustained in a collision between his automobile and one of defendant's street cars at the intersection of O street and Seventeenth street in the city of Lincoln, about 7:30 p. m., November 22, 1920. Plaintiff was driving north on Seventeenth street. When he arrived

at the intersection two of defendant's cars were approaching, one from the east, the other from the west. Plaintiff's car was struck and damaged by the east-bound car. As a basis for recovery plaintiff contends that the motor-man on the east-bound car failed to sound the gong or give any warning of its approach; that he knew plaintiff was approaching the track and was in a dangerous situation, but negligently failed to stop his car, and that the street car was driven at an excessive rate of speed. There are other allegations of negligence in the petition, but they are not material to the issue here presented. The answer contains a general denial coupled with an allegation of negligence on the part of plaintiff. The case was submitted to a jury, and from a verdict and judgment in favor of plaintiff defendant appeals.

The controlling assignment of error is that the court erred in failing to instruct a verdict in favor of defendant. The evidence discloses that plaintiff drove upon the track without looking to the west from whence the street car causing the damage came, and it is the contention of defendant that the failure of plaintiff to take proper precautions for his own safety and the protection of his property constituted such negligence upon his part as to defeat a recovery. The facts disclosed by witnesses for the plaintiff show that at the time the accident occurred the streets were wet and the rails and pavements slippery, the sun had set and a light mist had fallen. The pavement on Seventeenth street immediately south of its intersection with O street was rough, except a strip lying slightly to the west of the center which had been resurfaced. Plaintiff drove his car along the resurfaced strip of pavement until he reached the intersection of O street, where he claims to have veered his car to the right so that he might cross the intersection on the proper side of the street. He claims to have come to a full stop before entering the intersection, but says that, as he did so, his attention was attracted by the sounding of a gong on a west-bound street car

which was approaching from the east. He claims to have driven into the intersection at a low rate of speed, and that his attention was directed exclusively to the west-bound car, the gong of which car was being rung with unusual violence, and that he, for the instant, failed to look to the west and therefore did not see the car approaching from that direction until the forward part of his automobile had crossed the south rail of the east-bound track, and at that instant he saw the east-bound street car, heard the motorman call out to him, and the collision instantly occurred. He testified that the gong on the east-bound street car was not sounded nor any warning given of its approach, and that it was running at from 20 to 22 miles an hour. There is other testimony which corroborates plaintiff in his claim that the gong was not sounded nor any other warning given, and also as to the rate of speed. This testimony is directly contradicted by the motorman and other witnesses who testified for defendant. These witnesses testified that the gong was sounded before the car entered the intersection, sounded again before the collision occurred, and that the rate of speed was at from 12 to 15 miles an hour.

It is conceded that immediately before the collision the motorman threw on the emergency brake, and, according to some of the witnesses, the car came to a full stop almost immediately after the collision, while according to other testimony the car traveled 25 feet after the collision. It does not appear that the distance traveled after the collision can be material, except only as it may indicate the rate of speed at which the street car was progressing. On this point it is of doubtful weight. Plaintiff's automobile weighed in the neighborhood of two tons; the weight of the street car is not pointed out in the briefs, but it is shown to be a light-weight car operated by one man who performs the dual functions of motorman and conductor. The car was derailed as a result of the collision.

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. The court instructed the jury on the doctrine of comparative negligence under the provisions of section 8834, Comp. St. 1922. Laying aside all the minor issues, this appeal presents the question as to whether the trial court should have instructed a verdict for defendant, or submitted the cause, as it did, to the jury to determine from all the evidence whether either of the parties were guilty of negligence, and, if so, was the negligence of plaintiff slight and the negligence of defendant gross in comparison. The act of plaintiff which defendant relies upon as showing contributory negligence of sufficient degree to defeat a recovery is his driving upon the track without looking to the west at a time when he might have seen the east-bound car and avoided the collision.

"In determining whether a peremptory instruction was justified, the party against whom the verdict is directed is entitled to have every controverted question of fact resolved in his favor, and to have the benefit of every inference that reasonably can be deduced from the facts in evidence." *Schmelzel v. Leecy*, 104 Neb. 672.

Under this rule, before the court could instruct a verdict in favor of defendant, it would have to give full faith and credence to the testimony of plaintiff and his witnesses and concede that the street car was being driven across the street intersection at from 20 to 22 miles an hour; that no gong was sounded nor any warning given; that plaintiff was traveling on the proper side of the street at 6 or 8 miles an hour, and that his eyes were upon the street car approaching from the east with the gong sounding with unusual violence. With these facts conceded, the court would have had to find that reasonable minds could not differ on the question as to whether the negligence of plaintiff in failing to look to the west was more than slight and that of defendant in the operation of its car gross in comparison and resolve that question in favor of defendant. May reasonable minds differ on the question? It requires no discussion to show that plaintiff ought to have

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looked to the west as well as to the east before driving upon the track, and that his failure so to do was negligence. *Haffke v. Missouri P. R. Corporation*, ante, p. 125, and cases therein cited. On the other hand, the rate of speed at which it is said the car was operated and the failure to sound the gong or give notice of its approach are facts which, if accepted as established, would constitute negligence on the part of defendant. The rule to be followed under such circumstances is announced in *Francis v. Lincoln Traction Co.*, 106 Neb. 243, as follows:

"Where there is evidence tending to prove both negligence and contributory negligence in an action to recover damages for the causing of death by a wrongful act, the duty of making the comparison under the comparative negligence law is imposed upon the jury, unless the evidence of negligence is legally insufficient to sustain a verdict in favor of plaintiff, or the evidence shows the contributory negligence of the plaintiff is more than slight, or where the defendant's negligence is not gross in comparison with that of plaintiff."

Under all the circumstances, we are constrained to hold that the court did not err in submitting the cause for the determination of the jury.

AFFIRMED.

JOHN K. RICHMOND, APPELLEE, v. ULYSSES C.
BREITHAUPT, APPELLANT.

FILED OCTOBER 20, 1923. NO. 23424.

1. **Elections:** EVIDENCE: BURDEN OF PROOF. The ballots are the original evidence of the votes cast at an election, and upon a contest the burden is upon the contestant to establish that the ballots are those that were cast at the election and that they are in the same condition as when cast.
2. ———: ———: **BALLOTS.** If when the ballots are produced in court they are properly and sufficiently identified, have substantially been kept as required by law, and the court is satisfied from the evidence that they have not been tampered with but are in the

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same condition as to markings as when cast, they should be admitted in evidence, but unless such facts are made manifest with reasonable certainty, the ballots should be rejected.

3. ———: CONTEST: PROOF. Unless the parties stipulate otherwise, all the evidence must be produced upon which the contestant relies. The stipulation set forth in the opinion in this case is not sufficient to relieve the contestant from this duty.

APPEAL from the district court for Harlan county:
LEWIS H. BLACKLEDGE, JUDGE. *Reversed.*

Bernard McNeny and J. G. Thompson, for appellant.
O. E. Shelburn, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN,
DAY and GOOD, JJ., SHEPHERD, District Judge.

LETTON, J.

This is an appeal from a judgment of the district court, on appeal from the county court, in a contested election proceeding. Contestee, Breithaupt, upon the official returns, appeared to be elected county clerk of Harlan county. The returns showed that he had received 1,524 votes, and that Richmond, the contestant, received 1,518. A certificate of election was duly issued to the contestee. It was alleged by the contestant that illegal votes were received in each of 16 townships of the county sufficient to change the result; that legal votes cast for him were rejected; that votes were erroneously counted for the contestee, and that a proper canvass would change the result and show the election of the contestant. The answer was practically a general denial, with an affirmative plea that none of the ballots except in two precincts had been sealed and preserved as required by law, and that they had been tampered with and changed. The contestant was declared elected in the district court, and contestee appeals.

At the beginning of the trial in the district court, the parties entered into a stipulation of which the following is the material portion:

"It is hereby stipulated * * * that, after the

filing of the contest herein and the filing of the answer of the contestee, the following stipulation was filed by the parties hereto in the county court of Harlan county, Nebraska (omitting caption):

"The parties in the above entitled case agree that the hearing in said case commence on November 29, 1922, and that in the recount either party may take exceptions to the counting of any ballot counted or to the rejection of any ballot rejected, and when any such exception is taken that a record be made sufficient to show the facts with reference to the ballot in question and the objections thereto and said ballots be laid aside until final count is completed. It is further agreed that upon the completion of the recount in the county court of Harlan County, Nebraska, a record be made of the number of unquestioned ballots for each of the parties and of the decision as to the questioned ballots, and if the defeated party desires to appeal from the decision of the county court, said record, together with the ballots in question, the facts with relation thereto and the objections of the parties with reference to such ballots may be used as evidence on appeal. Said questioned ballots to be properly returned to the county clerk with all ballots but to be inclosed in separate marked envelopes. (Signatures.)

"That pursuant to the above stipulation the ballots of all the precincts of Harlan county, Nebraska, were counted by the county judge with the assistance of tellers agreed upon by the parties."

Contestant then offered testimony of the county judge as to the result of the recount of the ballots of Sappa township. Objection was made to this testimony as incompetent, but the witness was permitted to testify. One of the men who had acted as teller in the county court was handed a tally sheet of the recount which he had kept and had delivered to the county judge. When asked whether it was a correct statement of the result of the recount, the contestee made the objection

that the evidence was incompetent and no foundation laid, and renewed this objection to every question as to the result of the recount, and to the offer of the tally sheet. These objections were all overruled. The envelope containing 25 rejected and questioned ballots was then offered in evidence with the ballots it contained, to which offer the same objection was made. The county judge also testified, over objection, as to which of these ballots were accepted and counted, and for whom, and which were rejected, stating also from which township the ballots came.

The evidence in the county court was not preserved as a part of the record by a bill of exceptions. The ballots, except the 25 mentioned, were not produced at the trial; the contestant insisting that by the terms of the foregoing stipulation he was relieved from the necessity of adducing them as evidence.

In a contest of an election, in which a recount of the ballots is necessary, the original ballots should be brought into court and should be produced in the same condition and in the same receptacles as returned by the election officials, unless otherwise agreed to by the parties. "As between the ballots cast at an election, and a canvass thereof by the election officers, the former are the primary and controlling evidence; but in order that they may continue controlling evidence it must appear that they have been preserved in the manner and by the officers prescribed by the statute." *Albert v. Twohig*, 35 Neb. 563. See, also, *Martin v. Miles*, 40 Neb. 135. The strictness of this rule as to sealing and preservation has been somewhat relaxed in *State v. Barr*, 90 Neb. 766.

The statutory provisions relating to elections are not mandatory, but directory. *State v. Russell*, 34 Neb. 116. With the change in the methods of voting and the additional protection against fraud furnished by the Australian ballot law, there seems to be sound reason for holding that, if the ballots are clearly identified, which

they may be by an inspection of the signatures of the election officials on the back, and the trial court is fully satisfied that they have not been tampered with or altered in any way, the voter ought not to be deprived of his vote on account of the neglect of those officials whose duty it was to properly preserve the ballots. While this is so, election officials should follow the statute strictly, and perform their duty as prescribed therein. Negligence in this respect almost invariably gives rise to controversies such as have arisen in this case. Such controversies are detrimental to public interest, and tend to create discord, bitter feeling and public dissatisfaction. Upon a retrial of the case, if the ballots are properly and sufficiently identified, and the court is satisfied from the evidence that they are in the same condition as to markings as when cast, they should be counted; but, if this is not made manifest with reasonable certainty, they should be rejected. *Strubinger v. Ownby*, 290 Ill. 380; *Thomas v. Marshall*, 160 Ky. 168; *Newhouse v. Alexander*, 27 Okla. 46, and note 30 L. R. A. n. s. 602; *Averyt v. Williams*, 8 Ariz. 355.

Does the stipulation entered into relieve the contestant from the production of the ballots? We think not. The stipulation does not bind the contestee to accept as final the recount of the ballots in the county court, nor does it require the appeal to be tried solely upon an inspection of the questioned ballots, nor solely upon the record of the county court, nor that objections may not be made to the counting of any ballots produced. There is not a word in it which provides that the ballots are not to be produced. An appeal in such a proceeding, under such issues as presented here, brings up the whole case for trial *de novo* in the district court. Unless the parties stipulate otherwise, all the evidence must be produced upon which the contestant relies. *Griffith v. Bonawitz*, 73 Neb. 622. The contestant must establish that he has been elected, and the ballots are the primary evidence upon which he must rely. The burden

is upon him to show that the ballots produced are the identical ballots cast and that they are in the same condition as when cast. The official returns must be taken as true in this proceeding until a recount in the district court establishes otherwise. The contestee in any such case is entitled to raise objections to the recount based upon the manner in which the ballots have been preserved, and, unless they are admissible under well-settled rules, they are not entitled to be counted.

The ballots not having been produced in evidence, and there being no agreement that the result of the recount should be taken as true and correct, there is not sufficient evidence to overcome the official returns, and the judgment must be reversed.

Evidence was produced as to the manner in which the ballots of Alma and other townships had been kept, but since the evidence upon a retrial may not be identical, and the issue is not really presented in this appeal, the ballots not having been offered, we can only state the legal principles which govern, leaving them to be applied if a question as to the admissibility of such ballots arises upon a retrial of the issues.

In order to avoid contention at another trial as to the ballots examined and passed upon by the district court, it may be added that, if it is established by the testimony that the statement on the back of exhibits 7 and 8, that the voter was incompetent to mark his ballot and was assisted, is proved to have been placed there by the proper election officials, these ballots should not be rejected on account of such marking, if otherwise properly identified. As to the other ballots upon which the district court passed, we have reached the same conclusion as did that court.

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3. An order vacating a decree for permanent alimony and reserving the question for future consideration *held* interlocutory. *Goldenstein v. Goldenstein* 788
4. The authority of district courts over divorce decrees is extended by statute to six months after decree. *Goldenstein v. Goldenstein* 788
5. An order vacating a decree for permanent alimony, made more than six months after decree, must rest on grounds of orders after term time. *Goldenstein v. Goldenstein* 788

Dower.

1. In 1870 an equitable interest in government land prior to patent was not an estate to which dower attached. *Perry v. Ritze*.... 286
2. A foreclosure sale of the husband's land *held* to leave no interest in the wife to sustain a suit after her husband's death. *Filley v. Dickinson* 356

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1. Benefits to a railroad company by drainage of flood waters may be assessed by a drainage district. *Missouri P. R. Co. v. Drainage District* 762
2. Evidence *held* to sustain assessment of benefits to railroad property by drainage of flood waters. *Missouri P. R. Co. v. Drainage District* 762

Easements.

- A purchaser of land burdened with a visible easement takes with notice. *De Conly v. Winter Creek Canal Co.* 102

Elections.

1. The right to contest an election is a special statutory proceeding, and all the conditions for its exercise must be strictly followed. *Wilson v. Matson* 630
2. Contestant in an election contest must file a bond for costs within 20 days after the votes are canvassed. *Wilson v. Matson* 630

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3. The filing of a bond for costs within 20 days after the votes are canvassed is necessary to give the court jurisdiction in an election contest. *Wilson v. Matson* 630
4. The burden is on contestant to show that the ballots are those cast and in the same condition. *Richmond v. Breithaupt* 859
5. Requisites of admissibility of ballots stated. *Richmond v. Breithaupt* 859
6. Unless otherwise stipulated, all evidence on which contestant relies must be produced. *Richmond v. Breithaupt* 859
7. The statutory provisions relating to elections are directory. *Richmond v. Breithaupt* 859

Electricity.

1. Power company held estopped to claim that village acted *ultra vires* in making contract for electric current. *Village of Davenport v. Meyer Hydro-Electric Power Co.* 367
2. Exclusion of evidence as to rates held proper in suit to compel power company to furnish electric current. *Village of Davenport v. Meyer Hydro-Electric Power Co.* 367
3. Payment by a city of a surcharge held not a consent to an increased rate for electric current. *State v. Intermountain R., L. & P. Co.* 720

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Equity will grant relief from a mistake of fact as to an interest in land. *Lewis v. Newell* 142

Estoppel.

1. A defrauded vendee will not be estopped by a written agreement from showing fraud. *Moller v. Mallory* 269
2. Where land was conveyed to a foreign corporation, the grantor and privies held estopped to question the competency of grantee to take title. *National Bank of Commerce v. Lefferdink* 275
3. Facts constituting estoppel *in pais* must be pleaded. *Hughes Co. v. Farmers Union Produce Co.* 736

Evidence. See PROPERTY. RAILROADS, 3. WITNESSES.

1. Objection to testimony of a physician as privileged held properly sustained. *Acree v. North* 92

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2. A reply to a letter received and referred to a third person *held* admissible. *Murray v. Bailey* 114
3. A conversation by defendant's deceased manager that an employee was sent by him on an errand when he inflicted injuries *held* admissible. *Finegold v. Union Outfitting Co.* 209
4. A fact inferable from facts and circumstances proved may be taken to be established. *Finegold v. Union Outfitting Co.*..... 202
5. Refusal to require incompetent or irrelevant matter in a deposition to be read is not error. *Security State Bank v. Brown*.. 237
6. Rate of speed of a motor vehicle is not ordinarily a question for expert testimony. *Miller v. Central Taxi Co.* 306
7. Where a party refuses to produce a document, the court should instruct that the contents are presumed to be as alleged in the affidavit for its production. *Sallander v. Prairie Life Ins. Co.*... 332
8. Qualifying a witness to testify that an injury was not caused from a particular source is insufficient to authorize an opinion as to the cause. *Katskee v. City of Omaha* 380
9. Exclusion of transcript of former suit *held* error. *Craver v. McPherson* 431
10. The certificate of a notary to the acknowledgment of a deed is sufficient to authorize its receipt in evidence. *Neeneman v. Rickley* 446
11. Parol evidence is inadmissible to vary unambiguous terms of a valid contract in writing. *Atlas Refining Corporation v. Vaughan* 753

Executors and Administrators. See QUIETING TITLE, 1. WILLS.

1. An executor suing to recover money has the burden of proving that it was a loan and not a gift. *Krull v. Arman* 70
2. An administrator's sale of decedent's real estate pursuant to order of court is not subject to collateral attack for irregularities. *Mangold v. Grace* 216
3. The filing by a foreign administrator of a certified copy of his appointment instead of an authenticated copy, is an irregularity. *Mangold v. Grace* 216
4. Failure of foreign administrator to file an authenticated copy of his bond, or to give bond, are mere irregularities. *Mangold v. Grace* 216
5. Failure of administrator to report an attempted sale is an irregularity not affecting a subsequent sale pursuant to a new

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- notice. *Mangold v. Grace* 216
6. Inadequacy of price will not defeat an administrator's sale after confirmation. *Mangold v. Grace* 216
7. Failure of purchaser at administrator's sale to give bond to pay incumbrances is an irregularity not available in a collateral attack. *Mangold v. Grace* 216
8. An executor's sale of land under a will, directly or indirectly to himself, is voidable. *Johnson v. Erickson* 511
9. An executor's sale of land under a will, directly or indirectly to himself, is voidable, though he paid full value and there was no actual fraud. *Johnson v. Erickson* 511

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- Ordinance held not to require permit to store gasoline in manner prescribed. *Brown v. Easterday* 729

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1. Evidence held to sustain conviction. *Ingolsby v. State*..... 495
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Fraud.

1. Expression of opinion by an agent is not ground for an action against the principal. *Eisemann v. Anderson* 14
2. An opinion given to induce a consignment of wool for sale on commission is not actionable. *Eisemann v. Anderson*..... 14
3. Measure of damages for fraudulent sale of land stated. *Moller v. Mallory* 269
4. Damages held excessive. *Moller v. Mallory* 269
5. Reliance on false representations must be pleaded. *Smith v. Leu* 297
6. The measure of damages for a fraudulent sale of personalty is the difference between its actual and represented value when sold. *Smith v. Leu* 297

Gifts.

1. The burden of proof is on one having the affirmative of an issue as to a gift. *Krull v. Arman* 70
2. An instruction that money received by defendant from testator

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- would be presumed to be a loan, and not a gift, *held* erroneous.
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3. Delivery of notes *held* to be an irrevocable gift. *Novak v. Reeson* 229
4. Destruction of notes by donor after an irrevocable gift *held* not to reinvest title in donor. *Novak v. Reeson* 229

Guaranty.

- Contract of guaranty of notes construed. *Cooper v. Bane* 74

Guardian and Ward.

- A guardian may not sell personalty of a ward except under order of court after notice. *Coe v. Nebraska Building & Investment Co.* 322

Habeas Corpus.

1. Generally, state judges and courts cannot release a party confined under United States authority. *Hayes v. Pilger* 609
2. Jurisdiction where a party is confined under United States authority is in the federal courts. *Hayes v. Pilger* 609
3. State courts have authority over persons unlawfully held without warrant or complaint for an unreasonable time by United States officers. *Hayes v. Pilger* 609

Highways.

1. A railroad company placing an obstruction in a highway must maintain warning signals. *Sharp v. Chicago, B. & Q. R. Co.*... 34
2. The legislature cannot vest county authorities with power to permit a public nuisance in a highway. *Sharp v. Chicago, B. & Q. R. Co.* 34
3. A county cannot evade statutory liability for obstruction in a highway by delegating its duty to maintain it to another. *Sharp v. Chicago, B. & Q. R. Co.* 34
4. A county and a corporation erecting an obstruction in a highway are jointly liable for injuries resulting therefrom. *Sharp, v. Chicago, B. & Q. R. Co.* 34
5. A county board *held* not to have authorized that an obstruction in a highway should not be provided with warning signals. *Sharp v. Chicago, B. & Q. R. Co.* 34

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6. Public roads cannot be established by consent, unless written consent of all owners of lands to be used therefor be first filed in the county clerk's office. *Deloughery v. Lapsley* 105
7. The mere signing and filing of a petition for the establishment of a road does **not** constitute "written consent" to establishment thereof. *Deloughery v. Lapsley* 105
8. An order of a county board vacating a road *held* erroneous, where the record failed to show consent of a majority of the electors residing within two miles thereof. *Fcuerstein v. Saunders County* 121
9. In an action for injury to automobile from going into an unguarded ditch, negligence and contributory negligence *held* questions for the jury. *Tutsch v. Omaha Structural Steel Works* 585
10. Drainage of highway by public officials will not ordinarily be enjoined. *Lindberg v. Challburg* 626
11. The word "proportion" in the law providing for payment for improvements defined. *State v. Lancaster County* 635
12. The law relating to benefits from improvements construed. *Brown Real Estate Co. v. Lancaster County* 665
13. Assessments for local improvements are limited to special benefits. *Brown Real Estate Co. v. Lancaster County* 665

Homestead.

1. In 1870 a husband could transfer a homestead independently of his wife. *Perry v. Ritze* 286
2. Evidence *held* insufficient to sustain right of homestead in premises foreclosed. *Filley v. Dickinson* 356
3. The homestead interest of a judgment debtor may be conveyed or incumbered, and the vendee take title free of the judgment. *Hess v. Eselin* 590
4. A mortgage of "all homestead rights" *held* to extinguish the homestead as against judgment liens. *Hess v. Eselin* 590
5. Where the homestead interest has been extinguished, an execution sale and sheriff's deed pass title to the purchaser. *Hess v. Eselin* 590

Homicide.

1. Proof of intent is indispensable to sustain conviction of assault with intent to commit murder. *Garrett v. State* 118
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- to commit murder. *Garrett v. State* 118
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1. Deed *held* sufficient to convey interest of wife. *Watkins v. Harrison* 439
2. An antenuptial contract, if equitable, will not be disturbed after the death of one of the parties. *Neneman v. Rickley* 446
3. Antenuptial agreement construed and upheld. *Neneman v. Rickley* 446
4. The subsequent marriage of the parties and the mutual grants in the instrument *held* sufficient consideration for an antenuptial contract. *Neneman v. Rickley* 446
5. Evidence *held* to show wife abandonment and prosecution therefor brought in proper county. *Schmidt v. State* 504

Indictment and Information.

An information charging unlawful possession of a still and of equipment for the manufacture of intoxicating liquors *held* to charge only one offense. *Nash v. State* 712

Insane Persons.

1. A conveyance by an insane person cannot be ratified. *Coe v. Nebraska Building & Investment Co.* 322
2. Proceedings by creditor for appointment of a guardian for an incompetent *held* void. *Brandeen v. Beale* 686

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1. By-law of a fraternal beneficiary association providing increased assessments *held* reasonable. *Kunes v. Sovereign Camp, W. O. W.* 338
2. Clerk of local camp of fraternal beneficiary association *held* to be its agent to make and report reinstatements. *Kunes v. Sovereign Camp, W. O. W.* 338
3. A fraternal beneficiary association *held* bound by the action of a local camp clerk in reinstating members suspended for non-payment of assessments. *Kunes v. Sovereign Camp, W. O. W.* 338
4. Evidence *held* to show delivery of benefit certificate to insured in her lifetime and while in good health. *Flynn v. Royal Neighbors of America* 403

Intoxicating Liquors.

1. An information under chapter 187, Laws 1917, for having possession of intoxicating liquor need not negative exceptions available in defense. *Peterson v. State* 26
2. Evidence held to sustain conviction for violation of state prohibitory law. *Cura v. State* 476

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1. The right to peremptory challenges in civil actions is dependent on statutes or rules of court. *Petsch & McDonald v. Hines* 1
2. In Nebraska the only authority for peremptory challenge in civil actions is by rule of court. *Petsch & McDonald v. Hines* 1
3. Only three peremptory challenges are allowable to each side in civil cases. *Petsch & McDonald v. Hines* 1
4. A party and an intervener whose interests are not adverse constitute a single party within the rule governing peremptory challenges. *Petsch & McDonald v. Hines* 1
5. Where parties have conflicting rights, the court may allow each party three peremptory challenges. *Petsch & McDonald v. Hines* 1
6. Refusal to allow each defendant peremptory challenges held not error. *Petsch & McDonald v. Hines* 1
7. When defendants tried together do not demand their full number of challenges they waive their rights thereto. *Nash v. State* 712

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1. The statute apportioning the state into justice of the peace districts held constitutional. *State v. Kubat* 362
2. Secs. 1915, 1916, Comp. St. 1922, held to substitute the municipal court for that of justice of the peace in districts having a metropolitan city. *State v. Kubat* 362

Landlord and Tenant.

1. A contract for a 99-year lease is not unenforceable because the owner of the fee reserves the right to approve form of terms of lease. *Mercer v. Payne & Carnaby Co.* 28
2. A lease is personal property. *Nelson v. Radcliffe* 54
3. Possession of land under a lease from the owner does not be-

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- come adverse until notice to the owner by an unequivocal act of ownership by the claimant. *Reed v. Wellman* 166
4. Action on indemnity bond for failure to complete a building within time stipulated *held* not to be prematurely brought. *Gustin & Co. v. Nebraska Building & Investment Co.* 241
5. Unreasonable delay in performing an agreement to equip leased premises may justify cancellation of lease. *Poulos v. Skrekas*. 296
6. Tenant *held* to have no interest in a volunteer wheat crop on ground he rented and harvested wheat the previous year. *Lindley v. Wright* 530

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- Where fraud is practiced to obtain money, actual violence need not be proved. *Georgis v. State* 352

Mandamus.

1. Mandamus is not a proper remedy to correct errors in assessments for special benefits by a board of equalization. *State v. Lancaster County* 635
2. Mandamus is a proper remedy to compel performance of public duty, when there is no adequate remedy at law. *State v. Intermountain R., L. & P. Co.* 720
3. Mandamus will lie to compel a public service corporation to furnish electric current under a franchise. *State v. Intermountain R., L. & P. Co.* 720
4. A peremptory writ of mandamus is justified only where the alternative writ shows a specific duty enjoined by law upon respondent. *State v. Intermountain R., L. & P. Co.* 727
5. It is error to assume unproved facts denied by the return. *State v. Intermountain R., L. & P. Co.* 727
6. Writ denied if peremptory mandamus cannot be granted as prayed. *State v. Intermountain R., L. & P. Co.* 727
7. Judgment requiring a public service corporation to furnish electric current on terms at variance with a city ordinance *held* erroneous. *State v. Intermountain R., L. & P. Co.* 727
8. A writ of mandamus subjecting an individual to coercive process to compel a public service corporation to comply with a city ordinance is erroneous. *State v. Intermountain R., L. & P. Co.* 727

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1. Attorney's fees in compensation cases are limited to a sum approved in writing by the district judge. *Dysart v. Yeiser* 65
2. An agreement for attorney's fees in a workmen's compensation case must be approved by the district judge. *Dysart v. Yeiser*. 65
3. Statute limiting attorney's fees in workmen's compensation cases held constitutional. *Dysart v. Yeiser* 65
4. An employer who does not insure or prove his ability to pay compensation is liable in damages at common law or to statutory compensation. *Nedela v. Mares Auto Co.* 108
5. Sec. 3069, Comp. St. 1922, providing that employer shall furnish bond or show ability to pay compensation held valid. *Nedela v. Mares Auto Co.* 108
6. Employer and employee are presumed to contract with reference to the compensation act. *Avre v. Sexton* 149
7. Either party may relieve himself of the operation of the compensation act by contract or by notice. *Avre v. Sexton*..... 149
8. An employer who does not insure or furnish proof of ability to pay compensation is liable either at common law or under the compensation act, under part II, at the election of an injured employee. *Avre v. Sexton* 149
9. A non-insuring employer cannot take advantage of his own default, to the detriment of an employee. *Dietz Club v. Niehaus*. 154
10. Employment of caretaker of club-house held not casual. *Dietz Club v. Niehaus* 154
11. Compensation award held not excessive. *Dietz Club v. Niehaus* 154
12. The burden is on the owner of a vehicle causing injury to show that the driver was not his agent. *Finegold v. Union Outfitting Co.* 202
13. Findings in compensation case held conclusive. *Tragas v. Cudahy Packing Co.* 329
14. Injury during noon hour held within compensation law. *Tragas v. Cudahy Packing Co.* 329
15. An employee is bound to use safe methods. *Preble v. Union Stock Yards Co.* 383
16. Doctrine of "the last clear chance" held not applicable. *Preble v. Union Stock Yards Co.* 383
17. Assumption of risk is a bar to an action under the federal employers' liability act. *Preble v. Union Stock Yards Co.* 383
18. An experienced brakenman who continues his employment with

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- knowledge of hazards assumes the risk under the federal employers' liability act. *Preble v. Union Stock Yards Co.* 383
19. Submission of case under "last clear chance" doctrine approved. *Glarizio v. Davis* 679
20. Disobedience of order as to manner of doing work does not remove the servant from his sphere of duties. *Hibberd v. Hughey* 744
21. Injury while disobeying orders as to place of work held not to "arise out of and in the course of employment." *Hibberd v. Hughey* 744
22. Risks assumed under the federal employer's liability act. *Parsons v. Chicago & N. W. R. Co.* 836
23. Negligence held question for jury. *Nedela v. Marcs Auto Co.* 108
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25. Whether it was negligence to put an inexperienced minor to loading hay without instructions held a question for the jury. *Collins v. Weise* 552
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1. Materialmen have a lien on leased premises for materials ordered by tenant for permanent improvements. *Home Lumber Co. v. Gunderson* 31
2. A mechanics' lien statement is sufficient if the itemized account of materials or labor and the affidavit, construed together, comply with the statute. *Crowell Lumber & Grain Co. v. Ryan Co.* 225
3. One furnishing labor and material for the construction of a building is entitled to a lien. *Crowell Lumber & Grain Co. v. Ryan Co.* 225
4. Evidence held to sustain judgment for plaintiff, as modified. *Jensen & Son v. Jasperite Co.* 407

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1. A deed given as security for a debt will be held to be a mortgage. *Fike v. Lower* 209
2. Evidence held to sustain a decree establishing a deed to be a mortgage. *Fike v. Lower* 209
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upon failure to pay interest is optional with the mortgagee.

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4. Entry of release of mortgage in numerical index *held* not evidence of release. *Rath v. Wilgus* 810
5. Release of real estate mortgages must be indexed and recorded in full. *Rath v. Wilgus* 810

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1. An ordinance approved by the electorate of a city may be amended. *Schreifer v. City of Auburn* 179
2. Special paving taxes *held* not void because of a single contract for engineering work and estimates in several districts; the cost being apportioned. *Schreifer v. City of Auburn* 179
3. Special paving assessments are not invalid because the surveys and estimates were made by expert engineers; the city engineer being incompetent. *Schreifer v. City of Auburn* 179
4. The establishment of a grade on a street is not a condition precedent to the establishment of a paving district. *Schreifer v. City of Auburn* 179
5. Evidence in action for personal injuries *held* to sustain the verdict. *Forslund v. Swenson* 188
6. A master is not necessarily required to furnish safe appliances. *Schramm v. Casey* 194
7. Instruction on duty of master to furnish a safe team *held* erroneous. *Schramm v. Casey* 194
8. An ordinance requiring elevator shafts to be inclosed in fire-proof partitions *held* not retroactive. *Kerwin v. Thompson, Belden & Co.* 251
9. A public improvement assessment is not "taxation" within a statute exempting cemetery property from taxation. *Greenwood Cemetery v. City of Wayne* 300
10. A statute exempting property from execution sale *held* not to apply to a sale for special improvement assessments. *Greenwood Cemetery v. City of Wayne* 300
11. Unsold cemetery lots are not exempt from special assessments for paving. *Greenwood Cemetery v. City of Wayne* 300
12. The right of a pedestrian to use of crosswalks is coequal to that of a driver of a motor-propelled vehicle. *Christoffersen v. Weir* 390
13. It is the duty of an automobile driver where pedestrians are

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- numerous and traffic is congested to use a degree of care commensurate with reasonably anticipated danger. *Christoffersen v. Weir* 390
14. Warning devices on motor-propelled vehicles must be used opportunely to apprise pedestrians of their approach. *Christoffersen v. Weir* 390
 15. Municipal authorities authorized to issue bonds for public improvements may deliver bonds to a contractor in payment of improvements. *Ledwith v. City of Lincoln* 425.
 16. Where a notice to contractors provided that a city reserved the option to pay for an improvement with bonds, the city should be enjoined from making a contract if such provision prevented competition. *Ledwith v. City of Lincoln* 425.
 17. A city of the second class must follow methods of action prescribed by statute. *Weilage v. City of Crete* 544
 18. A city may act by resolution, if the action taken is merely declaratory of the will of the corporation and is a ministerial act. *Weilage v. City of Crete* 544
 19. Assessments for local improvements cannot be attacked collaterally, in absence of jurisdictional defect in the proceedings. *Weilage v. City of Crete* 544
 20. The words, "arising from defective streets," in the act providing for notice of claims for damages from defective streets, held not applicable to damages to abutting property. *Muffley v. Village of St. Edward* 572.

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1. An employee drowned while swimming in a pond on the master's premises held a licensee. *Spence v. Polenski Bros., Schellak & Co.* 56.
2. Petition in an action for negligently causing death of employee held insufficient. *Spence v. Polenski Bros., Schellak & Co.* 56
3. Plaintiff's negligence held to justify direction of verdict for defendant. *Haffke v. Missouri P. R. Corporation* 125
4. Where contributory negligence is shown, an instruction on comparative negligence is required. *Mares v. Chaloupka*.... 199
5. Rule as to comparative negligence. *Baker v. Omaha & C. B. Street R. Co.* 246.
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7. A person who knowingly exposes himself to danger cannot recover for resulting injury. *Kerwin v. Thompson, Belden & Co.* 251
 8. The rule of *res ipsa loquitur* held inapplicable to an automobile propelled by gravity. *Buzzello v. Sramek* 262
 9. The proximate cause of injury must be proved by a preponderance of evidence. *Katskee v. City of Omaha* 380
 10. Degree of care required by a minor stated. *Collins v. Weise*.. 552
 11. "Proximate cause" of injury defined. *Steenbock v. Omaha Country Club* 794
 12. A condition causing an injury by the act of a third person held not the proximate cause. *Steenbock v. Omaha Country Club* 794
 13. The placing of a flagpole, knocked against plaintiff by a third person, held not the proximate cause of an injury. *Steenbock v. Omaha Country Club* 794
 14. Motion for directed verdict held proper. *Steenbock v. Omaha Country Club* 794
 15. In an action for negligence against a street car company, held proper to submit the question of comparative negligence to the jury. *Traphagen v. Lincoln Traction Co.* 855
 16. Whether failure of an automobile driver to look and listen before passing in front of a street car constituted negligence held a question for the jury. *Traphagen v. Lincoln Traction Co.* 855

New Trial.

1. The trial court may pass on motion for new trial at a subsequent term. *Petsch & McDonald v. Hines* 1
2. An assignment of error in a joint motion for a new trial not good as to all will not be considered. *Davey v. Aevermann*.. 62
3. To obtain a new trial for newly discovered evidence, the evidence must have been such that it could not have been obtained by reasonable diligence. *Buzzello v. Sramek* 262
4. Denial of motion for new trial for newly discovered evidence which is merely cumulative, held not error. *Christoffersen v. Weir* 390

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1. Depreciation of value of property by operation of a lawful business is not ground for injunction. *Brown v. Easterday*.. 729
2. Right of an individual to enjoin a public nuisance stated. *Brown v. Easterday* 729
3. A gasoline station in a residence district is not a nuisance *per se*. *Brown v. Easterday*. 729
4. Storage of gasoline in compliance with ordinance is not a nuisance *per se*. *Brown v. Easterday* 729

Parent and Child.

A court will make such order for the custody of a child as will be sufficient for its welfare. *West v. Ofe* 443

Parties.

1. A person with whom a contract is made for the benefit of another may sue on it without joining such other person. *Coe v. Nebraska Building & Investment Co.* 322
2. A court of equity may allow intervention after trial begun. *Engdahl v. Laverty* 672
3. A court of equity may permit the owner to intervene after decree of foreclosure, where fraudulently deprived of his title. *Engdahl v. Laverty* 672

Partnership.

Members of an association sued as partners may show under a general denial that they were a corporation, or any fact to dispute facts plaintiff must prove, without pleading the same specially. *Hughes Co. v. Farmers Union Produce Co.* 736

Physicians and Surgeons.

1. Whether infrequency of examinations of fracture constituted negligence *held* a question for the jury. *Doty v. Lutheran Hospital Ass'n* 467
2. Whether a surgeon was negligent for failure to caution a patient afflicted with smallpox as to contact with others *held* a question for the jury. *Doty v. Lutheran Hospital Ass'n*... 467
3. Whether failure of a surgeon to give instructions as to future care of a fracture constituted negligence *held* a question for the jury. *Doty v. Lutheran Hospital Ass'n* 467
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2. The sale by a wholesale drug company of poisonous oil, correctly labeled, but not marked "poison," held not the proximate cause of death. *Levin v. Muser* 515

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1. Evidence held to establish authority of agent to indorse note. *Security State Bank v. Brown* 237
2. A principal who retains benefits derived from fraud of his agent after notice of the fraud is chargeable with the fraud. *Moller v. Mallory* 269
3. A principal cannot knowingly retain the benefits of a sale and escape obligations assumed by the agent in his name. *Dinsdale v. Sprague Tire & Rubber Co.* 290
4. Ostensible authority as agent is conferred where the principal allows third persons to act on an apparent agency. *Peterson v. Kuhn* 372
5. Measure of damages for merchandise converted by agent is the fair market value at time and place of conversion. *Weidman v. Barnes* 377
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1. The presumption of the continuance of facts shown to exist may be applicable to the ownership or possession of property. *Finegold v. Union Outfitting Co.* 202
2. Possession of a vehicle causing injury warrants an inference of ownership, which is presumed to continue until a change is shown. *Finegold v. Union Outfitting Co.* 202

Prostitution.

1. Evidence *held* to sustain conviction for causing a female to become an inmate of a house of prostitution. *Yerkes v. State* 498
2. Particular acts of lewdness or prostitution need not be proved to establish the character of a house of prostitution. *Yerkes v. State* 498

Quieting Title.

1. In a suit to quiet title, equity will require the purchaser at an administrator's sale to reimburse heirs for moneys paid to a mortgagee by the administrator out of proceeds of the sale. *Mangold v. Grace* 216
2. Sale of right of possession of land dependent upon a contingency upheld. *Wilson v. City of Neligh* 266

Railroads. See CARRIERS.

1. A traveler on a highway approaching a railroad crossing must look and listen, and his failure to do so without reasonable excuse is negligence. *Haffke v. Missouri P. R. Corporation*.. 125
2. An automobile truck driver *held* guilty of negligence precluding recovery. *Haffke v. Missouri P. R. Corporation* 125
3. In a suit to enjoin construction of a passageway for live stock as inadequate, evidence based on general knowledge will not overcome evidence based on actual use. *Kropp v. Missouri P. R. Co.* 257

Rape.

1. Where the evidence of the prosecuting witness and the defendant is conflicting, the testimony of prosecutrix must be corroborated. *Larson v. State* 620
2. Opportunity alone to commit rape is not corroboration of evidence of complainant. *Larson v. State* 620
3. Evidence *held* insufficient. *Larson v. State* 620

Receivers.

Appointment of a receiver of a foreign corporation by a court of its domicile does not place its property in Nebraska *in custodia legis* until reduced to actual possession. *Miller v. American Cooperative Ass'n* 773

Replevin.

1. Defendant may recover value of use of property unlawfully

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- withheld. *State Bank v. Murphy* 526
2. Plaintiff wrongfully seizing property is liable for interest on its adjudicated value from time of seizure, where the net usable value is not shown. *State Bank v. Murphy* 526

Robbery.

1. Evidence held sufficient to require submission to jury. *Gardiner v. State* 11
2. Instruction as to commission of a crime, where defendants are charged jointly, approved. *Gardiner v. State* 11

Sales.

1. Sale of a farm tractor induced by false representations may be rescinded. *Murray v. Bailey* 114
2. Delay in returning a farm tractor will not necessarily defeat rescission of sale induced by fraud. *Murray v. Bailey* 114
3. Return of personalty is not necessary to rescission where the seller refused to receive it. *Murray v. Bailey* 114
4. A sale by sample implies a warranty that the bulk corresponds to the sample in kind and quality. *Crawford v. Weeks Seed Co.* 196
5. Where a sale by sample was admitted, it was error to instruct that the fact that a sample was produced at the sale does not mean a warranty that the bulk equals the sample in kind and quality. *Crawford v. Weeks Seed Co.* 196
6. A consignor cannot ordinarily be charged with negligence in the resale of goods which the consignee unreasonably refuses to accept. *Goldmark & Sons v. Simon Bros. Co.* 614
7. Instructions defining "merchantability" approved. *Goldmark & Sons v. Simon Bros. Co.* 614
8. Sales of grain on the floor of a grain exchange are governed by rules of the exchange. *Holmquist Elevator Co. v. Omaha Elevator Co.* 658
9. Contract of rescission held to prevent vendors from recovering the amount claimed to be due for debts created before rescission. *Atlas Refining Corporation v. Vaughan* 753

Schools and School Districts.

1. The taxing power of a school district is statutory and must be exercised within the terms of the legislative grant. *Chi-*

Schools and School Districts—Concluded.

- cago, B. & Q. R. Co. v. School District* 459
2. A school district organized with a board of six trustees did not have power in 1920 to impose school taxes in excess of a 35-mill levy without an election. *Chicago, B. & Q. R. Co. v. School District* 459

Specific Performance.

1. A petition for specific performance of a contract for a 99-year lease is not demurrable because it contains a provision that the lease shall contain "usual conditions." *Mercer v. Payne & Carnaby Co.* 28
2. Equity may decree specific performance providing that, on vendee's default the premises be sold and judgment for deficiency be entered. *Bockelman v. Spires* 234
3. Want of mutuality as to the remedy of specific performance is not a defense, where vendors performed or tendered performance. *Perry v. Ritze* 286
4. Evidence held to sustain decree of specific performance. *Watkins v. Harrison* 439
5. Time held to be an essential element of contract for conveyance, and that purchaser was not required to accept a conveyance after time fixed. *Wilson v. Perry* 535
6. A conveyance by executors, with no showing as to whether the decedent was a married man or had left a widow, held insufficient to require acceptance as passing a merchantable title. *Wilson v. Perry* 535
7. Inadequacy of consideration is no defense to specific performance, unless so great as to furnish an irresistible inference of fraud. *Moore v. McKillip* 575
8. Inadequacy of consideration, suggesting fraud, is an important factor in a suit for specific performance. *Moore v. McKillip* .. 575
9. Specific performance denied, where purchaser signed contract under mistake, though vendor was not responsible therefor. *Moore v. McKillip* 575
10. Usual and ordinary covenants of a lease will be implied in specific performance. *Bennett v. Moon* 692
11. Equity will take cognizance of suits for specific performance of leases as well as deeds. *Bennett v. Moon* 692
12. Specific performance of a legal contract capable of being enforced without hardship should be granted as a matter of course. *Bennett v. Moon* 692

Statute of Frauds.

1. The defense of the statute is personal to the parties. *Happ v. Ducey* 429
2. Evidence held not to take an alleged oral agreement for future tenancy out of the statute. *Lindley v. Wright* 530

Statutes.

1. The word "shall" will be construed as "may" to sustain the constitutionality of a statute. *Reed v. Wellman* 166
2. In construing a statute, effect must be given to all its provisions. *Chicago, B. & Q. R. Co. v. School District* 459

Street Railways.

Right to use of street intersections by street cars and pedestrians is mutual. *Baker v. Omaha & C. B. Street R. Co.* ... 248

Subrogation.

A party paying the depositors of a failing state bank is not thereby subrogated to the rights of depositors against the depositors' guaranty fund. *State v. Holdrege State Bank* .. 814

Taxation.

1. Collection of void taxes may be enjoined. *Chicago, B. & Q. R. Co. v. School District* 459
2. In assessment of banks, the assessed value of real estate should be deducted from capital stock. *Citizens State Bank v. Board of Equalization* 704
3. A bank in its tax schedule should deduct only the assessed value of its banking house property. *Citizens State Bank v. Board of Equalization* 704
4. The remedy to recover taxes levied for an unauthorized purpose is against the political subdivision for whose benefit they were levied. *Lennemann v. Harlan County* 742

Trial. See APPEAL AND ERROR. CRIMINAL LAW.

1. Instructions as to relocating lost surveys construed together and approved. *Reed v. Wellman* 166
2. A jury cannot apportion damages among joint tort-feasors. *Forslund v. Swenson* 188
3. Instructing the jury as to correction of verdict held proper practice. *Forslund v. Swenson* 188

Trial—Concluded.

4. Statute relating to polling of jury *held* not to deprive the court of any former powers. *Forslund v. Swenson* 188
5. A correct instruction at variance with one misstating the law does not cure the error. *Schramm v. Casey* 194
6. It is error to submit to the jury the existence of a material fact pleaded by both parties. *Crawford v. Weeks Seed Co.* .. 196
7. An instruction that, if there is an obstruction of a street car track which interferes with a pedestrian's view, "he should use additional care," *held* not erroneous. *Baker v. Omaha & C. B. Street R. Co.* 246
8. Evidence as to whether defendant carried indemnity insurance is admissible. *Miller v. Central Taxi Co.* 306
9. The jury, and not the court, are triers of questions of fact. *Miller v. Central Taxi Co.* 306
10. Where a special finding is inconsistent with a general verdict, it is the duty of the court to render judgment on the special finding. *Walker v. McCabe* 398
11. When case should be submitted to jury stated. *Glarizio v. Davis* 679
12. It is not error to refuse to separate law issues from equity issues and try the former to a jury and the latter to the court. *Rath v. Wilgus* 810
13. Whether instructions produced misconception in minds of jury is ascertained by considering all the instructions and the tendencies of the proof to which they applied. *Parsons v. Chicago & N. W. R. Co.* 836

Trover.

- Failure to instruct as to measure of damages *held* error.
Weidman v. Barnes 377

Trusts.

1. A person gratuitously or officiously assuming to act as agent or trustee is bound by the implied terms of his confidential relation. *Simpson v. Harley* 454
2. The burden is on one claiming land under a constructive trust to establish the trust by clear and satisfactory evidence. *Bruce v. Cadman* 500
3. Evidence *held* not sufficient to establish a constructive trust. *Bruce v. Cadman* 500

Vendor and Purchaser.

1. Evidence *held* not to establish contract of sale of land. *Olmstead v. Caldwell* 18
2. A purchaser is bound by terms publicly announced at opening of an auction sale, though, not present when they were made. *Bockelman v. Spires* 234
3. Where the purchaser refuses to exercise the right of election of methods of settlement provided in a contract, the right shifts to the seller. *Bockelman v. Spires* 234
4. Where a city files a disclaimer, a decree quieting title against the city should contain no limitation or qualification. *Wilson v. City of Neligh* 266
5. Where land is conveyed by a lessor, a grain buyer who knowingly receives from a tenant the landlord's share of crop rent must at his peril pay the proceeds to the person entitled thereto. *National Bank of Commerce v. Lefferdink* 275
6. Insertion of "trustee" after the name of a patentee does not prevent him from transferring the land to another, where a trust is not disclosed. *Perry v. Ritze* 286
7. Variances in spelling of names may be cured by affidavit. *Perry v. Ritze* 286
8. A vendee who makes it impossible to place the vendor *in statu quo* cannot claim rescission. *Perry v. Meyer* 347
9. A party giving an option for the purchase of land parts with the right, for a limited time, to sell to any one other than the party to whom the option is given. *Gesselman v. Phillips* 416
10. A vendee is not entitled to rescind unless he places the vendor *in statu quo*. *Watkins v. Harrison* 439
11. Where a vendee, before acquiring title, contracts to resell, his failure to disclose the terms of his purchase is not a fraud on his vendee. *Tierney v. Dietsch* 462
12. A vendee may waive furnishing of abstracts at stipulated time. *Tierney v. Dietsch* 462
13. A vendee may enter into a valid agreement to sell land before acquiring title under an enforceable contract to purchase. *Tierney v. Dietsch* 462
14. A contract describing a portion of a lot will be reformed, when entered into by the purchaser under the mistaken belief, induced by fraud, that it conveyed the entire lot. *Hugo v. Erickson* 602
15. Possession of land is notice of the possessor's interests. *Engdahl v. Laverty* 672

Vendor and Purchaser—Concluded.

16. Possession of land by a tenant is not only notice of his rights as lessee, but of other interests of which inquiry would elicit knowledge. *Engdahl v. Laverty* 672
17. Vendor *held* not liable to purchaser acquiring title from third party. *Govier v. Wilson* 776
18. The vendee may recover payments when vendor is unable to perform. *Durland Trust Co. v. Augustyn* 800
19. A vendor conspiring to hinder the vendee in performance of a contract is not entitled to forfeiture of the payments made, but the vendee may rescind. *Durland Trust Co. v. Augustyn* 800
20. A purchaser is justified in rejecting an abstract showing an unreleased mortgage, though barred on its face. *Rath v. Wilgus* 810
21. An abstract showing release of a mortgage in the numerical index, but not of record, does not show good title of record. *Rath v. Wilgus* 810
22. Where an abstract showing a good title was not furnished in time, the vendees *held* entitled to recover back the amount paid on a land contract. *Rath v. Wilgus* 810

Waters.

1. A purchaser of land burdened with a visible easement of an irrigation canal may not restrain its use. *De Conly v. Winter Creek Canal Co.* 102
2. The owner of a mill-dam wilfully diverting water of a natural stream onto the land of another is liable for resulting damages. *McKee v. Nebraska Gas & Electric Co.* 137
3. A riparian owner wilfully diverting water of a natural stream is liable for resulting damages, irrespective of negligence or malice. *McKee v. Nebraska Gas & Electric Co.* 137
4. Good faith is no defense to an action for damages for wrongful diversion of waters. *McKee v. Nebraska Gas & Electric Co.* 137
5. Diversion of water for irrigation through lands of others without compliance with the statute may be enjoined, though permission has been granted by the board of public works. *Harris v. Steele* 213

Wills.

1. In construing a will, intent of testator governs. *In re Estate of Vandever* 651

Wills—Concluded.

2. In construing a will, the testator's intention, as ascertained from all the provisions of the will, governs. *Heyer v. Heyer* 784
3. Will *held* to convey a life estate, with power of sale under a certain contingency, and that, the contingency not arising, the power was extinguished. *Heyer v. Heyer* 784

Witnesses.

1. Witness *held* incompetent to testify to value of growing wheat. *Beck v. Spring* 160
2. A witness is incompetent to testify as to value of land with wheat growing thereon, where his only source of information is from inquiries made in the neighborhood. *Beck v. Spring*.. 160
3. Where the legitimacy of a child born during wedlock is an issue, neither declaration nor testimony of either spouse is competent on the question of access; but this rule does not obtain in actions for adultery, incest, divorce, or like cases. *Schmidt v. State* 504
4. An attorney employed to draw a note, but not consulted as to its legal effect, may testify as to its terms and conditions. *Novak v. Reeson* 229

